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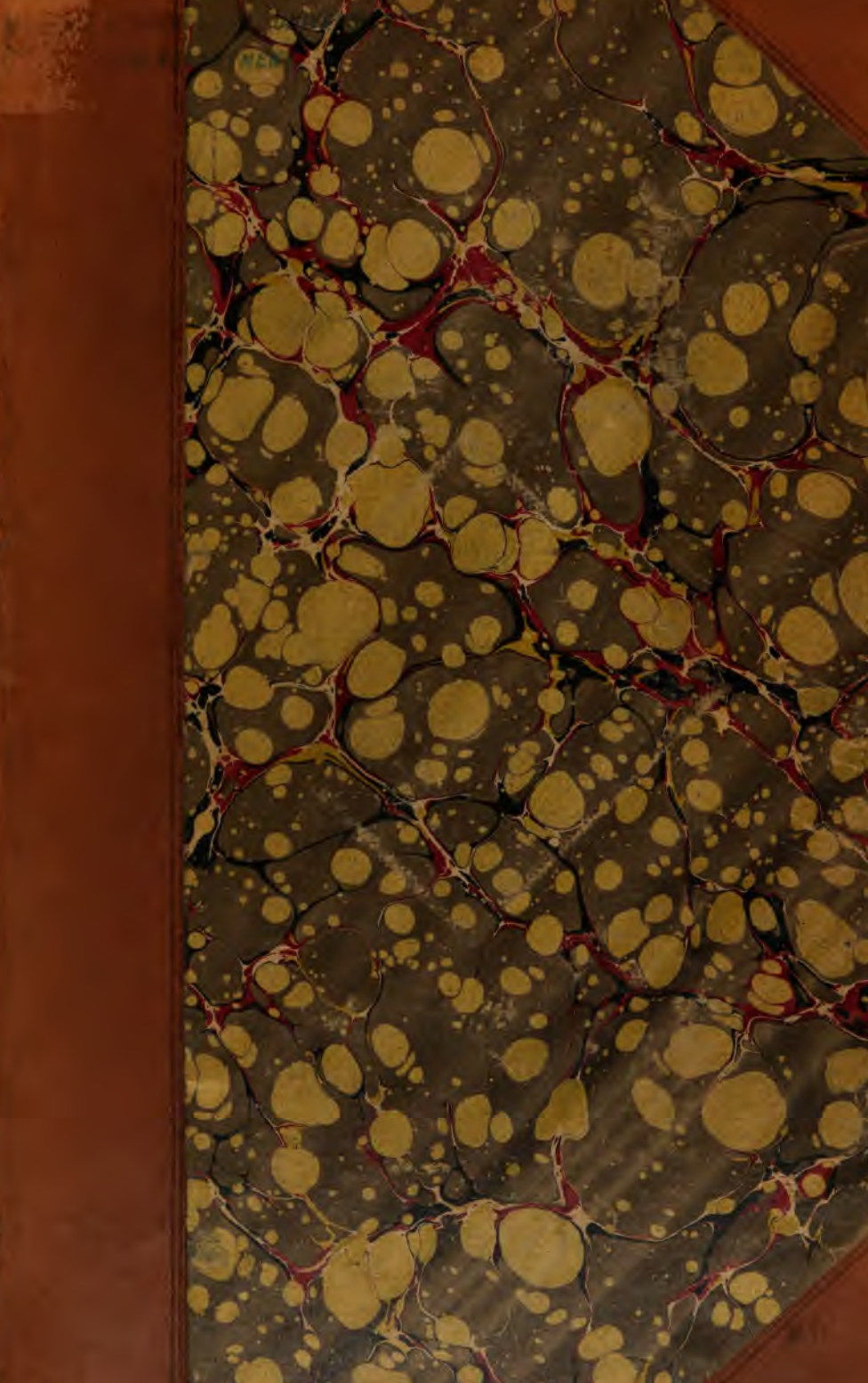
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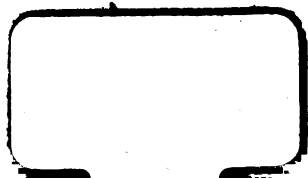
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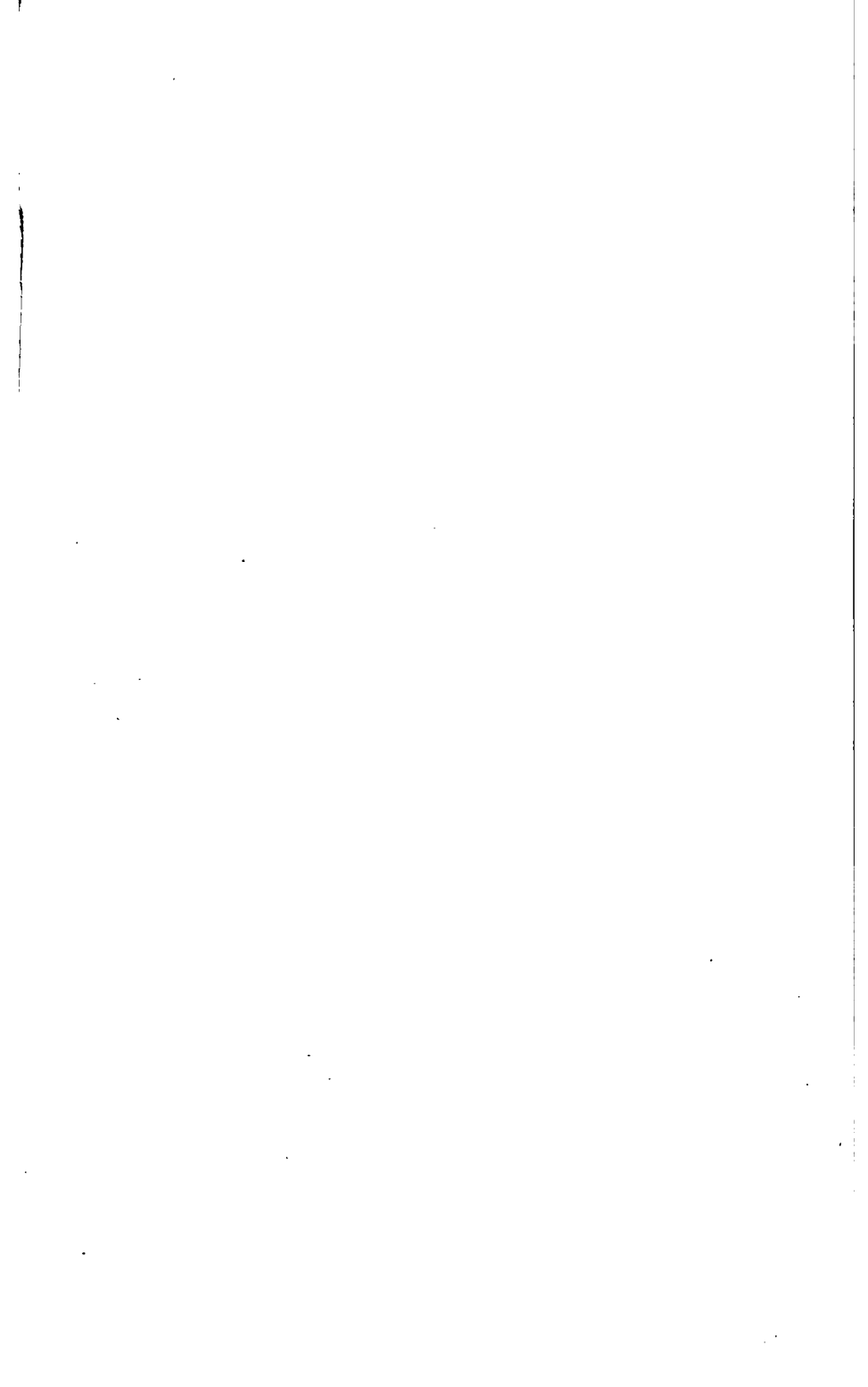
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Pictorial



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THE
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3. *English Laws for Women in the Nineteenth Century.* By C. NORTON. London. 1854.

WOMAN was created for a helpmate, not a slave of man. She was formed for domestic labours, not for the oppression of a master. It has ever been her honour to be well pleasing to a husband, and it has been equally his duty to repay the affections of her youth by a careful provision for her age. The laws of nature, recognised by those of all civilized countries, have thrown the robust offices of life into the hands of man; in this sense, he may be said to be invested with power; but notwithstanding the disparity of strength, his wife is his consort, not his dependant. Not a wife according to Milton's¹ cold and cramped image,—

¹ It has been noticed that Milton's idea of Eve was associated with her proficiency in cookery and her power to serve up to her lord "dulcet creams." Book v. l. 347.

" Male he created thee, but thy consort
Female for race ; "

And again,

" — well I understand in the prime end
Of Nature her th' inferior ; "

But the social partner contemplated by Shakspeare : —

" God, the best maker of all marriages,
Combine your hearts in one, your realms in one !
As man and wife, being two, are one in love,
So be there 'twixt your kingdoms such a spousal,
That never may ill office, or fell jealousy,
Which troubles oft the bed of blessed marriage,
Thrust in between the paction of these kingdoms,
To make divorce of their incorporate league."

Mr. Wharton, wearied by the dull verbiage of the Registration Acts, is glad to escape for a moment from their dry monotony, and recreate his reader and himself with just praise of a happy union. "Domestic society," he thus winds up his chapter on the marriage ceremony ; "is the seminary of social affections, the cradle of sensibility, where the first elements are acquired of that tenderness and humanity which cement mankind together ; and were they entirely extinguished, the whole fabric of social institutions would be dissolved."

There is, therefore, a moral partnership of virtues in the state of married harmony : if the more powerful sex contribute their manly vigour to the support of the common hearth, they are repaid by a tide of generosity and confidence, which are distinguishing features in the character of Woman. Hence, there is no surprise in finding that in all highly cultivated nations, and sometimes even amongst savage tribes, there is an individuality of interest in the marriage contract which the law of each place is compelled to recognise, because it is the law of nature. This regard for female welfare is expanded in civilized states throughout every relation of life. In infancy the child is not without a guardian and protector of her property ; in maidenhood, Mr. Davis, in the essay mentioned at the head of this article, shows the zealous

and ardent attempts of well meaning persons to throw additional safeguards around her honour ; juries visit with high penalties the breach of a betrothal ; both the Common and Statute Law provide dotation for the wife and mother, and for the desolation of the widow ; even the Ecclesiastical Law, unpopular and threatened with change, is in unison with the Common Law, by providing for the due vindication of the marriage bond.

It is not necessary that we should enter here upon the comparison which might be instituted between the condition of females under Christian and under Pagan rule. Gibbon observes, that "savages are the tyrants of the female sex, and that the condition of woman is usually softened by the refinements of social life." Nevertheless, without referring in terms of approval to the pages of Greek History in this respect, the praise of the Roman matrons has been so well celebrated as to leave little doubt of their superior freedom. The firmness of Volumnia, the affection of the Cornelias, and the resolution of Portia were not bred on the soil of slavery.

"When o'er her Brutus the chaste matron sigh'd,
And saw each vulgar means of death denied ;
Wound up to bold despair, her matchless mind
A brighter fate, a nobler end designed.
And 'know you not' she cried, 'no stern control
Can in its mansion keep th' unwilling soul?
For all that truth my noble father taught.'
She spoke, and calmly drank the burning draught."

This fine rendering of Martial's lines imparts to us a character unenthralled at least by domestic servitude. Juvenal, whose satires on the sex are so unsparing as to leave little room for compliment, and so unmitigated as to lead us to believe, (if we knew more of his personal history,) that he had been tamed, or, at all events, worried, by a shrew, still gives us a clear acquaintance with the influence which the women of his day possessed.

The Salic law of France was the offspring of peculiar circumstances, and can scarcely be cited in disparagement of

the general courtesy and consideration observable in the French people towards female rights.

But it is not our province to dwell long on ancient or foreign institutions. The books before us, which reveal the imperfections as well as the tenderness of our laws, must, for the most part, be our guide, through the remainder of this article. And we must premise, that, with every disposition to applaud English jurisprudence as a rational code of liberty, we are by no means so bigoted to the ordinances of our ancestors, nor even to modern improvements, as not to anticipate large measures of reform for the future. We shall be much mistaken if Mr. Wharton's full and well appportioned treatise does not afford many occasions for criticising truly the present state of female jurisdiction over property; and we must give Mr. Davis the credit of being a fair exponent of the views he professes regarding the personal rights of young females. Indeed, a subject so interesting as that of his Essay could hardly fail to produce competition, and the approval of such men as the Bishop of Oxford, Vice-Chancellor Wood, and Mr. Roundell Palmer, must be regarded, in any matter of this nature, as an adjudication in favour of a deserving claimant.

The book concerning Infancy with which Mr. Wharton naturally begins his work, is, indeed, of a general character, but, with the allowance of some few exceptions, it may be taken as a summary of the law as it affects female infants and posthumous children. The privileges of the posthumous family are considered in their capacities as devisees, portionists, heirs-at-law, surrenderees of copyholds, legatees, grantees under the statute of uses, beneficiaries under contingent remainders, sisters entitled as half-blood, appointees of a paternal guardian, executors. The author next deals with the question of gifts to illegitimate children unborn at the death of the testator. He complains of the narrowness with which Equity judges have treated these helpless offspring, the rule being, that unless the object of the bounty can be specified, there is not sufficient certainty to make the bequest available to the legatee. A case is then cited in support of this censure. Kempe, the testator, appended to his will a

codicil, by which he gave to M. M. 50*l.* per annum, so long as she should superintend his children. He then intimated his intention to marry her out of regard for her goodness to those children. He, however, referred to a wound he had received, and, expressing doubts as to his recovery, gave to such child, and children, if more than one, as M. M. might happen to be *enceinte* of *by him* the sum, or sums if more than one, by way of portion, as his other children would be entitled to under his will . . . &c.

Shortly after the testator's death, M. M. had a daughter who was named Mary Ann Kempe. The mother died a few days after the birth of her child, who claimed through her next friend, Wilson (the defendant in the suit in Chancery), the same interest as the testator's legitimate children."¹ Sir William Grant, referring to the rule laid down by Lord Coke, and the adoption of it by Lord Mansfield, observed, that without examining the reasons upon which it stood, he should adhere to it. That rule was, that a bastard could not take as the issue of a particular person, until it had acquired the reputation of being the child of that person, which could not be before its birth. The words "by me," "*enceinte by me,*" were fatal to the interest of this unfortunate infant, because a paternity was mentioned in the codicil, and the canon refuses to acknowledge, before birth, that a natural child can have any father. It is the fact, that had these words "by me" been omitted (and the judge would not reject them), Mary Ann Kempe would probably have been entitled. Such was the view taken by the Master of the Rolls, whose reason was that there would, in that case, have been no uncertainty in the bequest. Mr. Wharton remonstrates against this rule with an indignation from which we cannot withhold our sympathy. "So that," he concludes, "a man dying before the birth of his natural child, and honestly admitting such child to be his own in a solemn instrument which can have no efficacy until after his death, and is, consequently, then, beyond his amendment, has his righteous intent towards his helpless and unprotected offspring set at

¹ Exposition of the Rights of Women, p. 12.

nought by the withering authority of an ecclesiastical rule, which laughing at the atoning justice, and deriding the dying voice of a solicitous parent, positively makes him, contrary to his plainly recorded intention, to sin against his own flesh and blood in the cold silence of the grave.”¹

Another testator, perhaps not more anxious than the last, was either provident or fortunate enough to use the expression, “*the child of which A. B. is now pregnant.*” The objection on the score of public policy at once vanished. It was in vain that the case of Kempe was mentioned to the Chancellor. The testator had even employed a preamble, saying, “as I have reason to believe that the aforesaid Adrienne Maillot is pregnant by me,” &c. But as he continued, “I wish the child of which she is now pregnant,” &c., omitting the paternity, Lord Eldon held to the distinction between “my child,” and the more general description, and assumed the testator’s meaning in these terms:—“I may be mistaken; but I had rather run the risk of providing for a child that is not my own, than of incurring the guilt of leaving a child of mine without provision.”² A very small deviation, however, from this pattern text throws all abroad again. A well-disposed man made a devise to four of his illegitimate children by name, and thus secured *them*. But he went on; “together with every other child of the body of M. D., alive at my decease, or born within nine months afterwards, share and share alike.” The Court here excluded all the infants born after the date of the will. In point of law, the will was to be read, “every *legitimate* child,” &c.; and as there was no decided, specific, distinguishing mark to denote the bend of bastardy, the pious doctrine of equity ignored the error of the father, and it would seem, from the tenor of the will, handed over to the four already endowed *illegitimates*, the fund intended for the innocents in the same degree who were without a maintenance.³ The maxim, therefore, “*Summum jus, summa injuria,*” does not seem to have sprung from a base coinage. So absolute was our law against the ills of an unhallowed union, that it would not

¹ Pp. 13, 14.

² 1 Merivale, 141. 149.; *Gordon v. Gordon*.

³ Because all the real and personal property was left upon trust to the four illegitimate children named.—3 Russ. 370.; *Mortimer v. West*.

allow natural love and affection to be a sufficient consideration, in the case of illegitimacy, to raise a use in a covenant to stand seised, — no, not although justified by a covenant for further assurance.

If future judges shall deem themselves to be bound by by-gone decisions, or by a policy which Courts of Equity have made their own, it may be desirable to invoke the aid of the Legislature, which once nobly interfered to declare and rectify the rights of a legitimate posthumous infant.¹

We can see virtue and policy in any encouragement which laws can bestow upon wedlock, but we are unable to award the praise of merit to rules which arrest the wishes of a honest conscience, and surrender to strict heirship the substance which is destined to support a being with whom misfortune is a fault, and helplessness destitution.

“Hunger, thirst, nakedness, there grievous fall!
Unjust derision too! — that tongue of gall!
Forc'd pity meets him with a cold respect,
Unkind as scorn, ungen'rous as neglect.”

Mr. Wharton is not forgetful of the vexed questions which so often attend the proof of legitimacy. He enumerates the instances upon which these doubtful and sometimes curious issues depend, adding illustrative details, with many of which our readers are not unacquainted. But we cannot help regretting the incident which he relates of a Presbyterian clergyman, who was charged with incontinence towards his wife before marriage. A regular medical tournament took place on this occasion; there being not less than fourteen conflicting opinions, whether a child could be born at 174 days after intercourse: i. e. at five months and twenty-one days. If so, the child was of lawful procreation. The Presbytery, with great prudence, forbore to give an adverse verdict in a matter which chiefly involved the authority of the obstetrician. But as the clergyman, had he been overtaken by a fault, amended his error by an honourable and speedy reparation, it was a pity, we think, that such an inquiry, as delicate as it is repulsive, was ever set on foot.

¹ 10 & 11 Wm. 3. c. 16.; Wharton, p. 7.

Connected with this discussion respecting natural children and legitimacy, is Mr. Wharton's high disapprobation of the English doctrine, which bastardizes all children born before wedlock, and his equally firm adhesion to the Scotch code which, following the Civil Law, looks back with favour upon the offspring born before marriage, and, upon the adoption of that rite, clothes them with legitimacy. Gibbon observes of the Roman citizens, that "if at any time they desired to legitimate their natural children, the conversion was instantly performed by the celebration of their nuptials with a partner whose fruitfulness and fidelity they had already tried."

We are not entirely prepared to second Mr. Wharton's praise and censure in this comparison between English and Scotch jurisprudence. Still less can we agree with his corollary. "True," he observes, "our law allows a man, who has begotten a child, to marry the mother before its birth, and thus render the child legitimate, by its delivery during actual wedlock; a privilege which, while it is narrow and brief, shows that the ancient doctrine was based upon no very strict rules of morality, but rather upon a distorted and corrupted idea of legal rectitude; its perpetuation being altogether and entirely attributable to our ancestors' perverse and unjustifiable inveteracy of every thing emanating from Rome, whether political, religious, or jurisprudential; an inveteracy which is even now entertained with too much intemperance and too little discrimination. Thus national hatred begets national injustice."¹

What relation the neglect to avail ourselves of an institution which preceded the Pandects of Justinian can have with the prejudice against Papal Rome, to which the writer obviously alludes, we are at a loss to conceive. Compared with the ancient principle above cited from Gibbon, and which the Civil Law recognised, the policy, the religion, or the jurisprudence of the Vatican (if jurisprudence it can be called), is merely modern. Nor can we imagine why we are to be castigated with the charges of intemperance or blindness, because we are not servile copyists of the civil, nor

¹ P. 40.

assimilate ourselves universally to the Scotch system. If we have been inveterate against the innovations of Romanism, we have at all events enjoyed freedom of conscience ; and when we look around us, we can neither perceive national hatred nor national injustice, in maintaining with severe jealousy the dearly bought prize of religious liberty. But we must not wander too far from the text. The complaint of our author seems, after all, to rest upon a fallacy. The prominent point of the discussion is, not so much the value of a retrospective recognition of children not born under the sanction of Holy Church, as the prescriptive barbarism which has prevailed to the disadvantage of unfortunates who have been imperilled by the conduct of their parents. And it will scarcely escape notice, that all were bastards, according to our ancient laws, who were not religiously united by the priesthood of the day. No scruples of conscience had any weight with Roman Catholic bigotry and ascendancy. The one true Church threatened to swallow up all the rods in the hand of its antagonists, and Rome was never backward in pronouncing against the heresy which fled from her sanctuary.

We are glad, however, to be able to agree with Mr. Wharton in his condemnation of the harshness of the Common Law. The character of our climate, the customs of Christians handed down to us from the times of the Apostles, the chaste habits of English mothers, the jealous caution of female society in this land, the domestic virtues which attach the educated classes to their homes,—are guarantees in honour of marriage with one wife, which may well afford to spare sympathies on behalf of a less esteemed progeny.

Without a pledge to introduce the Scotch condonation into our code, we think that the Legislature should interfere to protect those who have not even the privilege of being children of the State. It might be inconvenient to place the illegitimate on the same footing with the well-born child. The Scotch law does not declare that an illegitimate birth shall change the incidence of its character. It only legalizes, upon marriage, the crooked agency of the past. An Act

might be framed to make provision for the bastard of an intestate, to give effect to the manifest intention of a testator, — even to carve out a landed inheritance for the *parvenu*, — without invading a policy which is censurable, more by reason of excess in applying it than from error in its principles. It is not difficult to discern and acknowledge the propriety awarding a provision to infancy that might otherwise combine destitution with misfortune; but we believe that, upon the advent of a tardy marriage, to invest the early offspring with all the claims of legitimacy would be found impolitic and incongruous, and ill in accordance with the usages of England.

The idea is captivating, it seems to have a show of justice, it may be sustained with the wiles of eloquence; it may even be suitable for those with whose institutions it is settled; but it may well consist that a rule, which has fallen in with the genius of one nation, may be attended in another of different tendencies with the fruits of laxity and improvidence.

But we must not lose sight of Mr. Davis. No sooner has the female passed the line of infancy than we find the author of the Prize Essay in full ardour to protect her maidenhood and vindicate her honour. With his learned and elaborate investigations into the laws of ages long past we have no space to hold conference; his collections of ancient codes have been made with diligence, and bear evidence of a love of his subject. The names of his adjudicators are, moreover, tests of his accuracy. The practical part of his essay is that with which we are engaged. It need scarcely be remarked, that, like most inquirers of our day, he is not satisfied with the state of the law. He does not consider that a parent's interest in respect of his daughter's chastity is sufficiently recognised. He seems desirous of treating the procurement of women by fraud and falsehood as a false pretence is now visited when the object sought is money or goods. "Not so much for the purpose of assimilating the nature of the offence and the punishment in each class of cases, but that the crime may be regulated rather by the fraud and falsehood employed, than by the wisdom or simplicity of the person

against whom it is directed.¹ He speaks of seduction as (1) private or simple ; and then (2) refers to the traffic in it. He would make alterations in the law regarding brothels.² Mr. Davis affirms that without the recognition of the parent's legal interest in the chastity of his child, "as the foundation of legislation on this subject, no measure can be complete or satisfactory." It is undoubtedly true that the expositors of our civil code have taken a very pecuniary view of this important matter. If the father loses the benefit or profit of his daughter's services through the act of her seducer, his right to damages accrues, and a jury is directed to award him compensation for the consequential injury he has sustained. But if his daughter goes out as an apprentice, to a milliner, for example, and the husband of the mistress robs her of her virtue, and causes the loss of her health and her engagement, he has no remedy. He has sustained no injury ; his child neither milked his cows nor served his table. The mother of the girl is not once thought of. Perhaps, it might be imagined that the seducer lay under some obligation to protect, instead of violate, the honour of his wife's servant. But, unfortunately, the contract of servitude was made with the *wife*, and however necessary it might be for the husband to be joined as a party in any action for a breach of that contract, he escapes cleverly from all legal responsibility, and clear from the consequences of his crime. We must not dwell too long upon each grievance, but this mode of dallying with every good and kind feeling had induced the Courts to say that if there existed in the daughter's breast any idea of a return home, they would still protect her,—they would hold that the paternal service never ceased. Accordingly, upon the breaking out of another unhappy occurrence similar to the last, it was averred, that the girl would have returned to her father, unless she had gone to some other service. This averment was inserted for the purpose of showing the intent to maintain a hold upon home, "and so assimilating this case to those in which actions have been held to lie for the seduction of a girl while on a

¹ Essay, p. 244.² Ibid. pp. 245, 246.

visit to a friend." "And," says Mr. Davis¹, "if this averment had been held to have that effect, it would have been a most important step towards getting rid of the practical inequality of the law, for the majority of contracts of domestic servitude would bear the interpretation put upon the main question by the pleader." However, there was a precedent to the contrary, an authority no less than that of the King's Bench, which decided that, although the daughter returned to her father at the hour of her calamity, and was maintained out of his earnings, the action, for want of a patent intention to come back at some definite time, would not lie. But pleaders are not dismayed. The daughter of a small farmer fell into the clutches of a master and a seducer. Her father was of sufficient ability to maintain her, and he received her. It was determined to call the poor-law in aid to vindicate the parent for the damage he had suffered. The case was a bad one, and the feelings of the jury were aroused. The verdict passed for 300*l*. But the master obtained a new trial by impugning the character of the girl. Nevertheless, the second jury awarded no less than 200*l*. Yet did this defendant again turn round, and, by a successful appeal to dry law, on the ground of the absence of the relationship of master and servant between the father and daughter, he succeeded. The Court could not find it in the bond. There was "no legal wrong to the plaintiff,—no invasion of his legal rights."¹ We have looked through the subsequent determinations on this point, but we are unable to find any that countervail this doctrine. Indeed, the law seems to be settled: "this monstrous wrong," to quote the indignant expression of Mr. Wharton, who seems by no means behind in his appreciation of the dilemma, "thus being without a remedy."² . . . Mr. Starkie was keenly alive to the same injury. After alluding to the fiction which has been already illustrated, he calls it "a reproach to the honour of England that the right to damages should not be necessarily consequent upon the injury." And we have the additional remonstrance of the Reporter who related the case of double

¹ P. 182.² P. 184.³ Exposition, &c., p. 182.

damages which we have just quoted. He justly added, that "the quasi fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child, as here, is sent unprotected to earn her bread amongst strangers."¹

We confess to a sense of rejoicing at this unanimity amongst lawyers. As the law now stands, common sense demands an alteration in the system. In the season of trouble, the father's house is the legal shelter of his erring child,—another has plundered her of virtue, but now reaps the harvest of his own wrong,—the father, often guiltless, the mother, not rarely heart-broken, are the scapegoats of an atrocious crime. The woman herself can be no claimant for damages on the bare ground of her unhallowed consent. She has, indeed, the sustentation, if not the solicitude, of a parent in her day of retribution, but the position of the father is one of strong sympathy; loss and disgrace are on one side, lust and impunity on the other.²

We do not find any other form of civil action connected with this matter, unless it be the remedy for a breach of the promise of marriage. Unless this event should offer, "in no case whatever," "can a woman herself obtain any legal reparation for the injury she has sustained from the seducer of her virtue."³

Mr. Davis, zealous to repress vice, presents us with an abundant list of misdemeanors. To prevent confusion and undue length, we append a note, mentioning the acts which he would have created or declared to be offences.⁴ To some of

¹ Davis, p. 185.

² Whether the new Act should confine compensation to cases where the child actually returns after seduction, or be capable of greater latitude, is a question deserving of careful consideration, but one which we cannot stop to discuss within our brief limits.

³ Exposition, &c., p. 185.

⁴ P. 244. *Misdemeanors*.—Master . . . seducing a girl, his servant, under 21. Hiring, or taking into service, a girl under 21 for the purpose of seduction.

The carnal knowledge of a child under 14.

The forcible abduction or detention of any woman.

To procure any girl or woman (irrespective of age) by false pretences or representations to have illicit connection with the defendant or any other person, whether such other person be or not known to the defendant.

his propositions we cannot see any sufficient objection. The greater difficulty is to obtain influence in Parliament, so as to carry out improvements upon which all men of sense are agreed. Thus we would have the female *intempestiva* till fourteen. In our climate it must be a movement of rabid viciousness or boyish precocity approaching to disease which would prompt to the touching of an infant of thirteen years. Nor do we see why a verdict of guilty of a misdemeanor should not be combined with an acquittal for rape in the instance cited. And we entirely agree that an abduction or detention for dishonourable purposes should come within the same category. Moreover, we entertain no doubt that these last acts are misdemeanors, although, under the particular difficulty alluded to by the author¹, a declaration in aid of the Common Law may be a prudent safeguard. We are, again, in union with the Prize Essay respecting procuration. The general pimp, the hardened panderer, can scarcely be brought within the meshes of the Common Law. He must be guilty of some particular overt act, or have confederated himself with others, in order to fall within the lash of the unwritten law. We are inclined likewise to hold with Mr. Davis that the stat. 12 & 13 Vict. c. 76. (the act against fraudulent defilement, passed short of its mark. If a procuration be employed to effect an illicit connection with *any man*, we fear that the judges would expect proof that some man in particular should have been sought for the intended victim. The framers of the Act might not have anticipated this, nor has there been, we believe, any decision; but Mr. Davis is free from doubt upon the point, and as penal statutes are subject to a strict construction, it is highly probable that his view is correct.

To procure any girl under 21 by any means of a fraudulent nature, or, if the procuring be for gain or lucre, by any means whatever, to have illicit connection with any other person.

To procure any girl or woman by the several means, and in the several cases above mentioned, to resort to any brothel or house of ill-fame, or to leave her house or parents for the purpose of illicit connection. . . .

Any attempt to commit these misdemeanors.

Master . . . indicted for a rape on his servant under 21: if acquitted of rape, to be found guilty of a misdemeanor, if the evidence shall warrant such finding.

¹ Essay, p. 206.

There seems to be no sufficient argument for limiting the age to twenty-one, where fraud enters into the misdeed. Cheated by a misrepresentation, a woman of thirty may be captivated by an infamous artifice, as well as a girl of sixteen. We are not to predicate of a female, when we contemplate a scene in which a woman past twenty-one is besieged by dexterous enticement, that she can, by possibility, possess the astuteness of a lawyer, or the craft of a practised sinner. Withdraw the cunning, and we are not prepared to advocate such close conclusions.

We will go a step further with Mr. Davis. It is easy to conceive that the wit of man can cozen a young woman of tender years, without risking the danger of a pretence or false statement. A mischievous lie, or a tissue of concealed craft, may as well entrap the chastity of youth, as a more active plan of fraud.

“ Disguise, I see thou art a wickedness,
Wherein the pregnant enemy does much.”

Therefore, our author would guard a woman under twenty-one against *any* means of a fraudulent nature. And if the payment of money is to be the price of vanquishing a woman's best endowment, we answer with him, again, that, *whatever be the means, Currat lex.*

An attempt to commit a misdemeanor, whether statutable or at common law, *is a misdemeanor.*¹ One step more. To *procure* any woman of any age to attend at a brothel, is so gross a breach of decency, that we would on no account have it dispunishable. And we believe that Lord Campbell, who in 1849 so stoutly advised reliance on the Common Law, was either not cognizant of the case of *R. v. Pierson*², or that he had determined, if a case of that kind should come upon him, to overrule this decision. The impunity of a bawd, irrespective of conspiracy, is so discreditable to our law, that we applaud Mr. Davis for the distinctness and accuracy which he has shown in his notice of this serious matter.

There are two unrighteous acts which the author of the

¹ 7 C. & P. 795.; Roderick's case. ² 1 Salle, 382.; 2 Lord Raym. 1197.

Essay has enumerated in his catalogue, the frequency of which, we trust, will soon cease to be a cause of complaint,—the seduction of a girl under twenty-one by her master; and the “hiring or taking into service for the purpose of seduction.” The first assumes a guilty course of persuasion by the master: the second is an unmanly or infamous proceeding in the worst direction. But we are not disposed to visit the principals in these sad acts with *the character of statutable misdemeanants*. We have already intimated our adhesion to the extension of the civil remedy, and in this decision we are supported by men of intelligence; but we are not prepared in these instances to invade the privacies of domestic life with the castigation of an indictable misdemeanor,—to place an unob-servant or even careless master in the power of a thoughtless young female,—to incite niceties of construction in the minds of a jury as to the primary seductive movement—to make that notorious, which, unless the subject of conspiracy, had been best left in obscurity, or trusted to the vindication of a father or near friend,—to say nothing of the extreme difficulty of proof in such cases, and the inconvenience of repeated exposures and of acquittals;—from all these obvious perplexities we gladly retire, and remain content with the large instalment of protection which has been proposed, or, if there be any remedy at Common Law, with that method of punishment.

And notwithstanding the odious character of a common stew, that “mortal poison,” we are yet of opinion, that the law in this respect, without eulogising its sufficiency, should be left *in statu*. This is a hard and delicate matter, one which, although it may bear a close, does not deserve a diffuse, inquiry. It must not, however, escape attention, that the Common Law is undeniably hostile to such places; that proceedings are often set on foot against the most obnoxious; and that convictions are more easily obtained against the proprietors of them than in the case of common gaming houses. Without venturing even to excuse the existence of such resorts, we think that policy and expediency admonish us to leave the law as it is, in its expressed disapproval and enmity.

As long as man remains in his present state, as some hold, of imperfection, or wickedness, according to the majority, it may not be an easy task to repress the illicit commerce of the sexes. But for that unhallowed association, some think that females of purity would not be so secure as they now are. We know that, comparatively speaking, our wives and daughters enjoy a moderate and rational liberty,—that they are rarely assailed with personal rudeness—that the crimes of ravishment or violence are not alarmingly on the increase; and we are not ignorant, on the other hand, that when a house of evil fame is marked by unbridled profligacy, the neighbourhood will be aroused to a successful struggle against its enormities. We, therefore, stop on the threshold when we are invited to meddle with the landlords of these houses beyond the powers inherent in the Common Law. We are not advocates for the stringent measures recommended in the Essay concerning landlords, nor would we give the right of search, nor attempt the definition, of a brothel. Had there not been good reasons for judicious forbearance in matters of this nature, the well-meaning zeal of societies and individuals would long since have worked a change; and if it be possible to refrain from crowding the statute-book with misdemeanors, the Common Law will be more honoured, the abominations of iniquity will outrage the eye and ear with less frequency, and the vices of our country be withheld from an impolitic publicity.

Mr. Wharton's chapter on Maidenhood is not without interest. He calls it the legal condition of an unmarried woman, and details her affirmative and negative powers in a series, from her inability to exercise the political franchise, to the statutory provisions which punish the negligent or careless firing of buildings by servants; a law which, though seldom heard of, is, nevertheless, unrepealed¹, and, we believe has been enforced upon one occasion not long past.

We turn to a more acceptable task. Matrimony, with its incidents, is a history which, although sometimes clouded with calamities beyond the reach of law, carries with it too

¹ Amongst other matters, it was excepted from the repeal of 14 Geo. III. c. 78., in schedule A. of 7 & 8 Vict. c. 84.; the Metropolis Buildings' Act.

many bright days not to be celebrated as the prime excellence of human happiness. In reviewing the course of this alliance, we find in the "Exposition," the betrothment, the settlements, the ceremony, the legal and equitable results of marriage, the voluntary separation of husband and wife, the unhappy contests which end in litigation, perhaps in divorce.

We cannot do more than glance at Mr. Wharton's considerations of all these events; but we must, at the outset, express our regret that the pride and luxury of society (we cannot exclude our own countrymen from the complaint) are in hostility to the rise of those unions which so vividly gladden the path of life. The jealousy of condition, and assumption of place, are barriers to many a kindly alliance; they either tempt to the cold fireside of celibacy, or to alliances from which the religious and moral sanctions are withheld, and yet from which youth is with difficulty restrained.

In treating the question of Affinity, Mr. Wharton has forborne from any observations on the expediency of disallowing a marriage with the sister of a deceased wife. We are not surprised at his reluctance. "Jurisconsults," he says, "divines, publicists, and laymen, print their various and conflicting opinions, and a league exists for the avowed purpose of effecting its abolition."¹ We shall follow his example in declining to canvass the subject; but as a woman may marry her own father's brother's son, and a man his mother's sister's daughter, and, moreover, as the rule concerning these unions has been subject to the most capricious revolutions, we expect that those who advocate the repeal of a comparatively modern statute will continue, from time to time, to show that they do not despair of success.

Another situation, far less commented upon, but one of at least equal importance, is the legal state of a woman as soon as she submits to those bonds which unite her to a new master. It is a word—that of master—which we use with apology, but not unadvisedly; for as soon as the ceremonial has concluded, the property and independence of the wife pass over to the possession or influence of the husband.² In end-

¹ i. e. The present law of prohibition.

² "A slave cannot make a contract, nor can he have monies of his own."—Norton,

less instances, this is the issue for good or for evil. We are quite aware of the power of settlements, and even of their frequency, but we are not ignorant of the numerous alliances which take place without any safe-guards against what Mr. Wharton justly calls the "failures, liabilities, and marital powers of the husband-father." The ante-nuptial disposition of property is, doubtless, a protective act, but it involves the intervention of another authority, no other than that of the Trustee; and so long as the Government shrinks from establishing a public system of trusts, so long will the substance of the helpless woman be exposed to the hazards of importunity, to the fraudulent relation, or faithless attorney.

Independently of the jointure, the husband reigns supreme. He has the ownership of his wife's money, he becomes during his life entitled to her legacies or future acquisitions, he can reduce into his possession all her securities, he assumes not only the management, but likewise "a freehold estate in his wife's lands of inheritance, during the *joint* existence of himself and wife, in right of his wife;" on his own part, he is able to deprive her of endowments from *his own* lands, without by any means giving her an equivalent¹; and if she should die, he still retains his grasp on her inheritance, under the endearing title of "Tenant by the Courtesy." If, on the contrary, he should be the first to quit the world, and leave a will, it is of no avail for his widow to have been the original owner of the fortune which has enriched her spouse, if his pleasure has been to bestow it on a stranger. Nay, if her means had been applied to the purchase of an estate, it is competent for the husband, who has bought that estate with his wife's property, to devise it in another direction, and, in a word, to leave her without an interest, and unprovided. If she labours at a business, and is rewarded with profit, the rights of matrimony can interpose to hinder either the employment or accumulation of them for the benefit of the joint family. "As to money," says Mrs. Norton, "even that which I earned by literature was subject to the claim of my husband,

p. 19. "I too had a contract. I was informed that, by the law of England, a married woman cannot make a contract, or have monies of her own."—*Ibid.* p. 200.

¹ "Any provision, however infirm or scanty, which is declared to be in bar of donor, will no doubt be held to be so."—*Wharton*, p. 230.

as the manual labour of the slave was subject to the claim of his master.”¹ She must, indeed, have been goaded by a consciousness of wrong to have complained of the attempt “to annul,” as she calls it, “my right even to my own soul and brains.” If, outraged by ill-usage, the wife is compelled to live apart, and yet *without a separate legal provision*, her surviving husband may still step in, upon her demise, and repudiate the disposal of her savings. He may even assent to a will made by her during her lifetime, and revoke it before probate. When he dies in her lifetime, she must, under such circumstances, make a new will, in order to avoid, at all events, a partial intestacy; and Mr. Wharton very prudently recommends the adoption of that preventive measure.² Without entering critically upon all the intricacies of Law and of Equity connected with this relation of matrimony, we think we may compliment Mr. Wharton upon the arrangement of his materials and the simplicity of his style.

But let us hear Mrs. Norton on the validity of a deed executed by her husband in her favour.

“I agreed,” she says³, “that for ten years past, and for all years to come, Mr. Norton should never be troubled with any debt of mine; he agreeing, in future, to pay 500*l.* a year. I told Mr. Leman I would be content with such a deed, signed by Mr. Norton, and witnessed by Sir F. Thesiger; and I left town on a visit to Lord Rutherford, the then Lord-Advocate of Scotland. The new deed was sent to Scotland for me to sign. I obeyed, and returned it by post. It never occurred to me as possible that the instrument was valueless. If I had thought so, I would not have gone through the ridiculous farce of signing it. I received it as the valid substitute for the unexecuted deed previously thrown aside, and as a settlement *for life*. Mr. Norton, in his published Letter, says that *he* knew at the time it was invalid.”

In a subsequent page, Mrs. Norton refers, with some bitterness, to this matter.

“It never seemed to occur to them” (*i.e.* to Mr. Norton, or Mr. Needham, his counsel), “that the question was, not whether my husband should provide, but whether he should

¹ P. 20.

² English Law, p. 141.

³ P. 364.

cheat me of a covenanted debt, on the quibble that he could not contract with his wife.”¹

We cannot undertake to adopt nor reject these strong words—“*Non nostrum est tantas componere lites.*” We know not the truth of the statement. But such is the law. A husband may, under such circumstances, make a solemn engagement with his wife, and if he think fit, he may recede from it.

To return to Mr. Wharton’s book, a division into short paragraphs leads to the more clear understanding of a difficult subject, and the volume before us is neither embarrassed by complex decisions, nor loaded with disquisition. The writer is evidently impressed with the anomalous constructions which often occur in settling marital claims. Having stated that the wife may dispose of savings from her separate maintenance, he adds: “But note this case,—a husband and wife separated by a written though unsealed agreement. The husband agreed to allow his wife a certain sum weekly for her support, which was paid. She made savings² out of this maintenance, and invested them in stock; a few days [two] before her death, she sold out the stock, and disposed of the proceeds by way of gift.³ The husband, however, was held to be entitled to receive back the proceeds so given, in an action for money received, against the person who so had them. But if the wife had disposed of them in the payment of debts incurred for necessities, or parted with them for good and valuable consideration, the husband would have been barred.” This was the case of *Messenger v. Clarke* (reported in 14 Jur. 748.⁴; and 19 Law J. Exch. 306.) The cases cited for the brother were chiefly equitable determinations by which it was held that a wife may dispose of her separate property, or of her savings, whether trustees are appointed or not. If there are no trustees appointed, the husband may be looked upon as the trustee, it being a rule in Equity that trusts are not to fail for want of trustees.

But these are instances of settlements or *allowances* for the sole and separate use of the wife. We fear, therefore, that even in Equity, a resolution adverse to this gift might possibly be laid down. Where the husband allowed the wife to make

¹ P. 84. See also p. 97.

² 100*l*.

³ To her own brother.

⁴ P. 401 (note).

a profit of the surplus butter and eggs, out of which she saved 100*l.*, his gift was voluntary and *for her separate use*. He borrowed this 100*l.*, and the wife was suffered to claim in Equity as a creditor against his estate. There is, therefore, a broad distinction. If it were otherwise, and relief in Equity could be found in a case like that of *Messenger v. Clarke*, the advocates of Fusion would have an addition to their score of grievances. But the Court of Chancery has some good points. If the husband, gifted as he is by the Common Law, without a struggle, with all these advantages, adventures himself into Equity to secure some further fruits of his alliance¹, that Court, upon discovering him there, meets him with the proverb, "He who asks equity must do equity." A settlement of some portion of the property must be made by him upon the wife; and, upon his refusal, the Court will attach the capital for her and the children, and if her fortune were considerable, and wasted by his extravagance, will even order the interest to be accumulated for the wife's benefit.²

We recommend to those who would guard the virtuous wife from the dangers of poverty, to treasure up the brief sentences of our author as "household words." They vest the separate estate, they work the accomplishment of her independence. Thus: "To be at her own disposal;" "For the livelihood of the wife;" "Her receipt in writing shall be a sufficient discharge;" "To pay into the proper hands;" "For her own sole use;" "For the sole use and benefit;" "Free from the power of her husband."³

We must not dwell much longer upon this interesting ground. It is a strange sequel of the marriage vow, which, amongst other solemnities, has this third symbol of union, — "With all my worldly goods I thee endow," that the hands of a master should immediately reach over his consort's goods, that the husband may violate this holy pact by spending his and his wife's wealth in riotous living, that he may lavish her riches upon others, that he may even execute a grave instrument beginning "In the name of God. Amen;"

¹ To recover some property, for instance.

² Wharton, p. 326. Unless the husband be in actual want. — P. 327.

³ P. 260.

and at the expense of a small compensation, bequeath the portion which has fed him to a favourite child, a stranger, or (if he will) to any hands other than hers. So tender of him is the law, that he cannot endow his wife with a plain gift, because they are one undivided person, whilst the rule, working less comfortably on her side, makes him tyrant of the whole. Yet no sooner has the breath left his body than the debts of the feme sole revive, together with the performance of contracts which, during marriage, she could not be called upon to fulfil.¹ Once more: but we must give the author's own words: — "After a woman has entertained a proposal of marriage, or has engaged herself to enter into that holy state, no voluntary disposition of her property, by way of preserving it from the married rights of her intended spouse, will be valid, if made without his knowledge, or assent, even though he be ignorant of the existence of such property; he, whether infant or adult, must be a party to such an exposition, in order to validate it, unless, indeed, his conduct towards her, as inducing her to cohabit with him before marriage, justified the concealment. An engaged woman, entertaining such a distrust of the man to whom she is about to commit her happiness, as to secure herself in so secret a manner, bids fair to render her nuptials an unconfiding, if not wretched union: she had better pause; for the law would treat as a legal fraud upon the husband any such clandestine disposition, and set it aside accordingly."² Thus, the attempt to realise an independence with means in the actual possession of a woman can be defeated in the absence of the husband's consent, and calls forth a judicious warning on the part of our experienced author. We cannot undertake to point out a remedy for that which is notoriously a wrong. It is not our province to do so; but there is not a reader who will not testify to the sad frequency with which the hard earnings of the industrious father or provident wife are lavished upon a domestic despot. There is not one of us who is not personally cognizant of the bad ends to which the fund is often destined—of the misery which waits upon the innocent female—of the evil effect which a sudden legacy or other gift, has had upon a man whose previous conduct

¹ See Wharton, p. 494.² The Exposition, &c., p. 364.

may have been free from censure. We cannot, however, retire from the discussion without briefly expressing our hopes that one of these two propositions may, at a future day, become part of our legislation. Either the absolute enjoyment by the wife of her own property, whether there be a deed of settlement or not, or the establishment of an office as the repository, under the guarantee and control of the Government, of real and personal chattels, for the mutual benefit of both parties and of their children.¹ The generosity of woman is great; she may be trusted with a far larger share of interest than she at present possesses, without usurping the privileges of manhood, or yielding the gentler virtues of her sex.

We probably should not have adverted to the right of the husband to his wife's person, "to secure which he may resort to the writ of habeas corpus,"² or may require surety of the peace against any one whose threats towards her are formidable, were we not desirous of alluding, for an instant, to the ill-usage by the labouring classes which so often embitters the domestic relation, and raises the public indignation. Nor should we have meddled, even under these circumstances, had it not been for the eagerness with which some members of the House of Commons have striven to add corporal punishment to the increased imprisonment in force against what is called wife-beating. Mr. Wharton truly says: "It is a great error to suppose that a husband can chastise his wife, for she may have the security of the peace against him should he attempt any thing of the kind. Our laws fully recognise the force and truth embodied in the following passage:—

"The man that lays his hand upon a woman,
Save in the way of kindness, is a wretch
Whom 'twere gross flattery to call a coward."³

"It is also a vulgar error that a husband can get rid of his wife by selling her in the open market-place with a halter

¹ We hope that amendment will not be deferred till the Greek Kalends, nor till we have taken St. Petersburg. Mrs. Norton, speaking of a delay in introducing a Bill in the ensuing session respecting the Habeas Corpus Act, quotes Lord Campbell: "I am sorry to say that, when the next session arrived, nothing was thought of but the taking of Quebec; and the subject was not again resumed till the very close of the reign of Geo. III." Preface, p. iv.

² Exposition, &c., p. 312.

³ The Honeymoon.

round her neck. Such an act on his part would be severely punished by the local magistrate."¹

Lord Palmerston, with a prudence which shows that he is not accessible to clamour, nor deceived by fallacies, rightly postponed the infliction of this *supplicium*. It required some time for brutes who had so long wantoned with impunity to understand that the law would vindicate the social tie, and that the magistracy would vindicate the law. A firm dispensation of the six months' penalty has considerably tamed that savage nature, which we do not shrink from saying would be aggravated by a whipping. It is well that a Bill should be cautiously dealt with which would return a husband to his wife with a brand on his back. The principle of vengeance is apt to mislead reason, and the honest horror we cherish of a brutal action may hurry us into acts which are incompatible with wisdom. The wife is with difficulty persuaded to accuse her violent partner; often is the accusation made and sustained by extrinsic proof; but if the barbarous and imprudent lash be suffered, not only will you sunder from you the sympathies of the woman, while you degrade and enrage the man; but you have likewise, on the other side, the displeasure of a section of mankind, who would consider your punishment as savouring but little of Christianity. Coward though he be who strikes a woman, and coward though he prove himself when the stroke of vengeance descends upon him, the wife, the object of your care, will be the victim of your want of consideration. A temporary coercion conveys no long nor lasting stigma, but they who would go beyond are ill read in the history of life if they suppose that the most welcome present they can make to an injured female will be a dishonoured husband.

Those who read Mr. Wharton will follow him through Infancy,—through Youth,—Matrimony,—Widowhood, by him called Viduity (a word not unknown, as there was the "*Viduitatis Professio*" of ancient times),—and Trusteeship. In the catalogue of fiduciary positions, he enumerates

¹ Exposition, &c., p. 312. But Mr. Wharton does not say what this punishment may be. Unless a breach of the peace be committed, it seems that the man can only be bound to his good behaviour by the *magistrate*, although he may be indicted for misdemeanor at Common Law.

the agent, the trustee, the duties of executrix and administratrix, with the husband's powers over these administrations, the rights of a widow, and the position of a jurywoman, either under the writ *de ventre inspiciendo*, when a widow declares herself enceinte, or when a woman convicted pleads pregnancy in stay of execution. He gives us a dry question from the text books, "that if a woman have once had the benefit of this reprieve, and been delivered, and afterwards become pregnant again, she shall not be entitled to a further respite, but may be hanged before the child is quick?"¹ He goes on to relate the demonstrations of medical science, that the child lives from the moment of conception, and animadverts upon the legality of hanging the mother at any period of the gestation. He might have added, that to put a woman to death after the throes of childbirth, and with a baby at the breast, is an act revolting to human nature.

But the work would have been imperfect without his chapters on Concubinage and Harlotry. He shortly touches upon the contracts and agreements incident to the condition of a mistress, and passes on to the subject of prostitution, which was a necessary element of full discussion in Mr. Davis's Essay, and has been accordingly noticed.

There is one other important matter which must be mentioned before we leave the enumeration of these volumes. Matrimonial differences sometimes lead to litigation, and not unfrequently to divorce. The author of the Exposition has devoted a portion of his work to the ecclesiastical jurisdiction which assumes authority over domestic feuds; he has detailed the remedies for the correlative injuries of Adultery and Bigamy, and made up his third book of the consequences of marriage with the occasional dilemma of Divorce.² We can do no more than take a hasty view of this last division, which is alone worthy of the most anxious attention. Mr. Wharton enters upon the two kinds of divorce — *à mensâ et thoro*, and *à vinculo matrimonii*. The first is chiefly the creation of the Courts Spiritual, and the other is decided by the House of Lords in their legislative capacity, and is never impeached in the other House, although there seems to be one instance, in the reign of William and Mary, where a bill of this cha-

¹ P. 540.

² Book iii. c. 7.

racter was initiated in the Commons.¹ However, "the House of Commons possesses an officer called 'The Lady's Friend,' who takes care, if the Lords have not provided for it, that the husband makes a suitably moderate provision for his wife when divorced. But should she continue or renew her misconduct, this provision will become forfeited."² We scarcely know whether Mr. Wharton has read the short but sensible Report of the Ecclesiastical Committee of the Law Amendment Society on the "Law of Divorce;" and, on the other hand, to any such committee his account of the conflict of the English and Scotch laws on this matter can hardly fail to be interesting.³ The whole law on this point merits notice, because, whatever may be the fate of the ecclesiastical jurisdiction in testamentary affairs, it does not appear that any new bill affecting divorce by the judgment of the Court Christian, is put on the table of the House. And yet it may be argued, that scarcely any branch of our jurisprudence calls for a more strict revision.

Notwithstanding the opinions of Montesquieu and Dr. Taylor⁴, in favour of impunity on the part of the husband, and that of Lord Eldon palliating the consequences of male compared with female adultery, the injured wife is allowed to sue against her faithless partner. Beyond doubt, and thus far we agree with Lord Eldon, by the natural consequences of events, the faithlessness of a husband is not so fruitful in social evil as the wife's infidelity; but when that great Judge adds, that "it became the especial duty of a wife to forgive her husband's misconduct from motives of tenderness and concern to the interests of his innocent children," we think that he largely encroached upon the generosity of a sex naturally generous, often assailed, much under mastery, — and that a man who is capable of repeating offences of this character against the vow of his nuptials is not to be held up as a striking object of condonation.

We feel bound to insert Mrs. Norton's opinion upon this point. Although her work, being in a great measure personal, is necessarily of a vehement character, we will not forget that she is a woman distinguished for her personal charms, her

¹ P. 471, note (b).

² Pp. 485—490.

³ P. 480.

⁴ P. 451, note (c).

wit, her literature, her talents, and her industry, and, we may add, her sorrows.

“The crime of the man is nothing in comparison with the crime of the woman,” say the objectors. “Why? Because—and here we come to England’s merchant spirit, gain—property, not morality, being the thing held sacred—because the wife’s adultery may give the husband a spurious son to inherit! Truly; and the husband’s adultery may give his friend, into whose house he has crept like a thief, to steal faith and honour, a spurious son to inherit. Or it may give some wretched victim of his seduction a spurious son to drown or strangle. Or it may give *him* a spurious son, by some wanton, on whom he lavishes the patrimony of his legitimate sons. No matter! the wrong done *by* him cannot be measured by equal lengths with the wrong done *to* him; for he is a MAN, and claims his right of exemption by natural superiority. As Peers cannot be hung, but must be beheaded,—a Member of the House of Commons cannot be arrested for debt,—so they cannot be arrested in sin, on equal grounds with an inferior party.”¹

Having passed over the ground of Adultery, the grievance of Intolerable Cruelty comes under discussion. “Spitting on a wife is a gross and unmanly act of cruelty.” So are blows, or bodily injury, or threats sufficient to alarm a mind of ordinary firmness. We are scarcely able to agree with the quotation (2 Hagg. 73²) in which a blow between parties in the lower and higher conditions of life is endeavoured to be distinguished. “Among the lower classes, blows sometimes pass between married couples, who, in the main, are very happy, and have no desire to part; amidst very coarse habits, such incidents occur almost as freely as rude or reproachful words,—a word and a blow go together.” The quotation then proceeds with the illustrative instance of a nobleman of high rank and ancient family, or a gentleman, a person of education, who might happen to fall into such an error. And it concludes: “The particular situation of the parties, when the ill-treatment is inflicted, may create a still further aggravation.”³ The comparison seems to assume too

¹ P. 153.² Exposition, p. 468.³ P. 468, note (w).

wide a latitude. There can be no good reason why the wife of the labourer, harnessed to work like the laborious ox, should be goaded by ill-treatment to return a blow, and be then taunted with coarseness when she resists the savage animal with whom she is associated. However, violence, especially towards an educated woman, is termed intolerable cruelty, and draws after it a sentence of separation. But a husband may issue an interdict against his wife's intercourse with her own family,—he may even deny her access to her own children,—without being amenable to this judgment.¹ The principle of the divorce *à mensâ*, &c. seems to be imperfectly understood. It rests upon a more equitable foundation than is usually set down to the credit of Courts Ecclesiastical. The same tribunal which made those,—

“Vent’ring to be brisk and wanton,
Do penance in a paper lanthorn,”

intended this divorce more by way of penance or separation than an earnest disruption of the conjugal tie. “The sentence of divorce, or rather of separation, so far from dissolving the matrimonial tie, and permitting the parties to marry again, by its very tenor contemplates the possibility of reconciliation and renewed cohabitation.” This is explained by the pledge required before the sentence is given, “a bond for the observance of a chaste and continent life, without contracting marriage during the existence of the offender. *Separantur sed remanent conjuges.*”² It does not, however, appear that the bond of abstinence is required on the side of the peccant spouse. Nevertheless, as a return to the domestic union is intimated, a more extensive use of this privilege may, perhaps, be permitted with advantage to the general welfare. In the words of the Society's Report, “Why clog the administration of justice with unnecessary expense, delay, exposure, and humiliation?” And it may be asked, Why make the sentence absolute until the consent of both parties renews the social compact? For the judgment of divorce forbids a prayer for the restitution of conjugal rights. If the period of the sentence were limited to one year, to three years, even to five years, subject to an appli-

¹ See Mrs. Norton's Pamphlet, p. 49, et seq.

² P. 467. How is this bond to be enforced?

cation on either side to dissolve the separation, a beneficial result might often be attained, especially if the status of legal liabilities were duly maintained in case of continued separation. But we would gladly have an answer to the demand of the Society's Committee. It related, indeed, to the more serious dissolution *à vinculo*, but its scrutiny is well applicable to the divorce now under consideration. "The question comes to this," says the author of an article in the *Law Magazine on Parliamentary Divorce*, "is the principle of the dissolubility of marriage for adultery to be admitted or denied by the law? If the former, on what principle is the remedy to be extended only to the rich? If the latter, why are any divorce Bills passed at all?"¹

The power of decreeing a temporary separation not merely with reference to the rich man, might be of some value. It is worthy, surely, of a fair discussion whether a man, who, by law, is master of his wife, should not lose the benefit of her society and assistance if he abuses his authority so grossly as to treat her with cruelty. Already may he revel in idleness on his wife's earnings. He may impoverish an able and admirable partner by his expenses. He may be austere, overbearing, an unprofitable inmate of a busy dwelling; "*malus, ingratusque maritus*." We have nothing to say to that. "Courts of justice cannot cure all the miseries, imaginative and self-imposed, of married life."² But when he has recourse to violence, when he tarnishes the honour of the nuptial chamber, when he prostitutes his vows to a strange woman, we think it time that his punishment should not depend upon the indignation of his wife's relations, upon her ability to carry her cause into court, or upon the rustic outbreak of the country village. The person most injured ought to have some voice in her vindication:—

"Mulier sævissima tunc est,
Cum stimulos odio pudor admovet."

"Sic collige, quod vindictâ
Nemo magis gaudet, quàm femina."

Her wrongs prompt these deeds of anger. The inequality of our legal administration leaves its justice attainable only

¹ 1831. Vol. vi, p. 43.

² Wharton, p. 470.

by a minority. The adulteries of middle life and the ferocity of the humble ranks scarcely meet with a sufficient retribution. The report of the committee above alluded to, seeks to repose the power of divorce *à vinculo*, in the Lords of the Privy Council. We wish that something better could be done with the divorce *à mensâ et thoro*.

The appointment of a judicial officer to preside over this species of divorce may be suggested. The procedure should be *inexpensive*; the separation pronounced for *limited*. The renewal of domestic intercourse before the expiration of the sentence might be promoted with the sanction of the judge, *but not allowed without the consent* of the injured party¹; the divorce *à mensâ et thoro* should, therefore, whether for adultery or cruelty, be with a view to future amity, yet so as to protect where protection is needed, and punish where punishment is due. We conclude these remarks with the observation, that the frequent imprisonments now inflicted leave the woman and her children at the mercy of the poor-law, or drive them to their own resources, or call forth the compassion of their kindred. A judgment of limited dissociation by a competent officer would scarcely produce greater evils, whilst it might lead to more just consequences than we see attached to these wrongs under our present system.

Some few words on the divorce *à vinculo matrimonii*, and our task is completed. We must not look to the Roman Law for the rule upon this mode of breaking the marital bond. The licence which prevailed under these institutions was scarcely checked by the restrictions of Theodosius and the Code of Justinian: "the law was soon after replaced by Justin upon its former footing."² Nor are we to expect much purer doctrines from the Roman Catholic Church. The successors of the Apostles seem to have propounded canons which were hardly in unison with their infallibility; some recognising, some discountenancing, this species of divorce. Notwithstanding the Council of Trent, which went so far as to

¹ Thus the limited sentence would stand unrepealed unless there were a *mutual consent*. But at the end of the period, whether for six months or five years, the relations of husband and wife would be revived.

² See a useful article in the Law Magazine for 1831, vol. vi. art. 2., "The Law of Parliamentary Divorce," where many authors on the subject are mentioned,

maintain the strictness of conjugal union, in the face even of adultery, the new doctrine was not implicitly received in all Catholic countries.

It was left for our Reformers to vindicate the Saviour's precept, and to admit the incident of complete divorce on proof of matrimonial infidelity. As late as 1547, there was still a division of opinion. The case of Lord Northampton was settled by an Act of the Legislature, but the Act was repealed, and the Ecclesiastical Court assumed the power of final divorce throughout the reign of Elizabeth. At length, in 1601, the ancient doctrine revived, and the divorce in the Court Christian was held to be only *à mensâ et thoro*; yet it was not until 1669 that the laity ventured to judge for themselves by carrying a bill through Parliament which united the previous Ecclesiastical sentence of separation with the final divorce. Nearly thirty years had elapsed when another bill was debated, thrown out, but renewed and passed. The bishops then came forward, and many of them declared that they considered a second marriage lawful, after full proof of adultery. After this, appeals to Parliament increased in frequency; that which was an indulgence to high rank and great connection descended in turn upon all who could afford to meet the cost; at length, in the session of 1829 alone, seven divorce bills received the Royal Assent; and in the short one of 1830, from February to July, no fewer than nine!"¹

We are not disposed to enter here upon the expediency of transferring the jurisdiction from the House of Lords to the Lords of the Privy Council. Having endeavoured to make a separation in ordinary cases more easy of attainment, it may be sufficient to add, that the less expensive procedure before the inferior tribunal would the more easily enable the husband or the wife to resort to Parliament, or to the Council, or to any other constituted authority, for a dissolution of the nuptial contract. Even now "that the form is not *inevitable* as a preliminary step, is proved by the divorce of one of our peers being lately obtained without it."² It is gratifying to reflect that "Parliament will seldom bastardize the issue, except in a very clear case."

There are, however, two circumstances which have been

¹ See the above article, *passim*.

² Norton, p. 155.

passed over hitherto, and we hope will not escape the attention of the Commissioners on Divorce, whose report, we believe, is not yet made public. These are Impotency and Lunacy.

Impotency has the effect of making a marriage voidable. Lunacy, or want of reason, is deemed to be a legal incapacity so as to render the continuance of the matrimonial contract invalid. And by 51 Geo. III. c. 37., the marriage of any person proved lunatic by inquisition under the Great Seal, or of any lunatic, whose person and estate have been committed to the care of particular trustees by any Act of Parliament, is declared, before the lunatic be declared of sane mind by the Lord Chancellor, to be null and void. But if the impotency or lunacy succeed the union, it remains as a chain which cannot be loosened. We wish that the Commissioners would consider the hardship of a modern event. A young woman is allied to a husband in full health, but he is attacked with fever after the ceremony, and his case becomes one of settled mental derangement. A visitation of impotency may arise to frustrate the happiness of the wife, even to hurry her to the grave . . . in obedience to the laws of virtue and of her country. Although we are not servile admirers much less imitators of the Civil Law, we may take a lesson from it upon the happening of these painful calamities. It allows a divorce, and we ought also, in conformity to common sense, to give the difficulty a just consideration.

Whether the husband or the wife be the subject of lunacy, the children, if there be any, must be guarded with anxious solicitude, and aided with an ample provision. In the other case, the dilemma of children is absent, but, either way, the impotency must be ascertained to be hopeless, and the lunacy incurable. Whether upon such trying and not unfrequent exposures, a second marriage might be suffered without destroying the *vinculum* of the first, might be a point for argument. We offer no opinion. It is hard when adverse fortune compels the less prosperous of our race to single solitude, but harder still when premature disease or sudden infirmity, forbid to the desolate spouse "that Nature's great

command should be obeyed." One of our best painters of nature has blamed

"The coarser tie of human laws,
Unnatural oft', and foreign to the mind."

But we retire from a theme which our authors have not provoked, but which is alien to the subject of divorce, and has by no means escaped comment from the modern press.

The closing advice of Mr. Davis¹ is applicable to all amendments of the laws which we have discussed. "Every provision must have the test of practical experience, and an opportunity be given for remedying unforeseen difficulties and omissions before the legislator can withdraw his watchful care and anxiety, or consider his task completed. When his part is fulfilled, it remains for the executive, backed by the cordial co-operation of the well-affected portion of mankind, to effect the rest." Mrs. Norton ends more poetically:—"Let my part in this be only as a vision borne by the wind, a cry coming over the waves from a shipwreck, when you stand upon the shore, — and which you turn and listen to, not for the sake of those who call — you do not know them — but because it is a cry for HELP." We are quite aware of Mr. Bowyer's Bill for altering the Law of Criminal Conversation. But it is by no means certain that it will pass. We think that it would be better to refrain in Committee, should the Bill reach that stage, from inserting any provision to authorise an *Indictment*. . . . Perhaps a moderate fine might be permitted. But if the *Court* should be invested with this power, the act will be a *law for the rich*. And if magistrates should be enabled to impose it, there will be a frequent and unseemly exhibition of indecency before an uneducated multitude. An *Indictment* can hardly be acceptable, unless a divorce be appended, *ex vi termini*, to a verdict of Guilty. For an imprisoned husband or wife can hardly be an acceptable partner for the future. . . . We had rather pronounce for a temporary or other divorce, as we have intimated in this article (p. 29).

¹ P. 247.

ART. II.—M. FÆLIX.

It is now more than a year since the cause of comparative jurisprudence lost one of her most zealous adherents in M. Fœlix. Jean Jacques Gaspard Fœlix was born at Oberstein, in the electorate of Trèves, June 3. 1791. This country belonged at his birth to Prussia, was afterwards ceded to France, and included in the department of the Sarve, but restored to Prussia after the events of 1814. The father of of M. Fœlix was a counsellor of the Royal Court of Cologne. Young Fœlix received his legal education at the Faculty of Coblentz, one of the twelve Faculties of Law instituted by the decree of the fourth complimentary day in the year 12.¹ Having completed his legal education, and commenced practice as an *avocat avoué*, at Coblentz, in 1814, Fœlix found himself amidst a host of difficulties arising from the complication of laws in the Rhenish provinces, viz, the French Code (remaining still in force), the German Common Law, and lastly, the special laws governing the adjoining parts of the Germanic Confederation. In consequence of this an impulse for comparative legislation arose in the mind of M. Fœlix, which continued ever after to be the leading feature in his character. And when, after some time, his labours had produced some fruit, the idea occurred to him to transfer his quarters to Paris where, little or no attention being given to this branch of study, a wide and almost untraversed field lay before him, in which he, afterwards the guide of so many, advanced with slow but steady step.

In the month of June 1826 he put this project into execution. Three years later, in March 1829, he obtained letters of naturalisation, and on the first of May was enrolled as an *Avocat* of the *Cour Royale* at Paris.

Far, however, from giving up the study of comparative

¹ They consisted of the nine faculties of France, besides those of Brussels, Coblentz, and Turin.

legislation, he only embraced it with more ardour; and although necessarily obliged to give up the greatest portion of his time to general business and consultations, yet he seems even from the first moment of his residence in Paris to have commenced that series of publications which have insured him so distinguished a name in the science of law.

It would be impossible to mention in detail all that he published in the form of pamphlets or articles in public journals, we shall therefore confine ourselves to the works properly so called,—Code Forestien annoté, 2 vols. 8vo., Paris 1827; Traité des Rentes Foncières, 1 vol. 8vo., Paris 1828; Commentaire de la Loi sur la Contrainte par Corps, 17 Avril 1832, 1 vol. 8vo., Paris 1832; Traité du Droit International privé ou du Conflit des Lois de différentes Nations en Matière de Droit privé, 1 vol. 8vo., Paris 1843–7.¹

All these bear the mark of conscientious labour. M. Fœlix not only made an imperishable work, but gave it that indescribable neatness of “finish” which only a practised workman can do. Legislative, judicial, and every description of document bearing upon the point in discussion are collected with the greatest care. Perhaps his best work and the one which is also best known, is his treatise on private international law, which alone would have sufficed to place his fame on an enduring basis.

Throughout Europe, and, we may add, in America, this book is quoted with eulogium, and recognised as a standard authority upon this point. It brought its author high praise from many learned bodies and foreign princes.

M. Fœlix alone, perhaps, in France, could have written a work to realise the plan of which required a vast collection of documents upon foreign law and jurisprudence, continual correspondence with the most celebrated jurists in Europe and America, and considerable knowledge of living languages, all of which M. Fœlix possessed. Combined with all these advantages he had an indomitable zeal for labour, which will account for the quantity of information that the treatise upon international law contains, both upon the complication of

¹ M. Fœlix has left in manuscript a translation and continuation of De Marten's *Resumé de l'Histoire des Traités de Paix*.

civil laws in different countries and the rights to be allowed to each, according to the individual and the object.

Notwithstanding the title of the work, which refers only to private law, all the latter part treats of international criminal law. The second edition, published in 1847, was dedicated to M. Salvandy, then Minister of Public Instruction and well worthy of this homage, from his zeal and ardour in encouraging useful works, and in protecting men of merit. Another work, also one of European fame, was the monthly review set on foot by M. Fœlix in 1833, under the name of *Revue Etrangère de Législation et d'Economie Politique*. This publication was carried on for about seventeen years, and only ceased in 1850, in consequence of the death of M. Joubert the able editor, combined with other difficulties. This vast collection of interesting papers, consisting of sixteen thick volumes in 8vo. of 800 or 1000 pages, and to which a great number of the most eminent French and foreign jurists contributed, contains a most valuable collection of documents upon the state of legislation and the changes of the science of law, both in Europe and America. Not only are the laws and jurisprudence in force in foreign countries there enumerated, either generally or in detail, but no design, either of a code or important project of law is forgotten. Their analysis and contents are clearly explained either by M. Fœlix, or some other writer specially qualified to render the most exact account. An analogous work, quite as good, but much more brief in its details, and analytical rather than critical, treats of the new works on foreign law. For seven years M. Fœlix, with the assistance of several friends¹, conducted this review, corresponding with learned men of all countries interested in this matter, editing himself the articles for each number, and, in short, taking upon himself the correction of proof sheets and all the other cares which devolve upon an editor. Confined as it was to foreign law and law reform, we can understand that the readers of the review were more select than numerous, especially in France where, as in England, legal

¹ Particularly by that of M. West, since counsel to the Prefecture.

studies of pure erudition and of indirect or remote advantage do not generally excite much interest. There, as here, what is especially desired in studying law is immediate utility—actual and daily practice. There is, it is true, something cosmopolite in a lawyer's nature, whether in France or England! but at the bottom it is little more than a sort of vague philanthropy, greedy of perfection in uniformity, and aspiring to depress all the countries of the world to some general formulas. Such a disposition is but little favourable to an attentive, faithful, and persevering research for what may be called the *individuality* of a nation whose manners and ideas transfer themselves to their laws and institutions. Thus such a class of study in both countries has never been but the choice of a few, but in our opinion, truly philosophical minds, since they thoroughly study the subject before deciding upon it. The Foreign Review, therefore, could not obtain more success than it really did obtain; namely, much esteem, some influence, but no money; and, for several years, M. Fœlix, who supported himself only by his oral and written consultations, had to support with his purse the publication to which he already gave a very considerable portion of his time.

In 1840 MM. Duvergier and Valette associated themselves with M. Fœlix with the view of enlarging the scope of the Review, by adding a French part, of which they had the sole direction, M. Fœlix still retaining the foreign department. The new publication, now taking the name of *Revue Etrangère et Française de Législation, de Jurisprudence, et d'Economie Politique*, existed we have said above, until the end of 1850. It was during this long period of co-operation that his new fellow-labourers became thoroughly capable of appreciating the excellent qualities of M. Fœlix, his goodness, disinterestedness, and his attachment to his friends not less than his high capacity for and devotion to the cause of comparative jurisprudence and all other branches of law reform.

Neither the cruel disease which for several years imprisoned his vigorous spirit in a paralysed body, nor the necessarily forced cessation of the Review, and the labours

connected with it, could shake the friendship which united him with his former *collaborateurs*.

M. Fœlix died May 26. 1853, with the same religious sentiments which he had always possessed and manifested during his life. He has left behind him to deplore his loss a daughter and wife who were devoted to him. His wife, especially, was unceasingly attentive to him day and night, during his prolonged suffering; writing to his dictation when well enough to resume his labours in part, and greatly assisting him by searching for and extracting the references he needed.

M. Fœlix was corresponding member of the Royal Academies of Munich, Naples, and Turin, as well as of the Society for the Amendment of the Law. In 1838 the Faculty of Law at Fribourg in Brigau sent him the diploma of Doctor of Law. In 1850 he received the decoration of the Legion of Honour, at the instance of M. de Parieu, then Minister of Public Instruction, who had himself published in the review a most excellent article upon the Law of Possession.

His character and life may be summed up in a few words. He loved the pursuit of knowledge for itself, and the welfare of his fellow-creatures better than his own. The world took him at his word, and condemned him to thankless labour, poverty, and disease. Let us trust that he has now the only reward that he sought, or that could suffice.

ART. III.—LAW PERIODICAL.

A MATTER of some interest has been recently discussed with reference to our Review, but we do not know that we should have thought it necessary to bring it before our readers, especially as it has been decided satisfactorily, if it did not involve — a point which we consider of great importance — the means by which a periodical devoted to the consideration of questions connected with law reform can be established and carried on. The permanent existence of a

work of this kind, as we think, is a great object to gain, and we hope to satisfy our readers that the *Law Review* is placed not only on the right footing, but on the only footing on which it can be usefully and properly conducted.

It will not be necessary to show that some organ for the expression of opinion in connection with the amendment of the law is essential to its successful progress and operation. Free discussion on this branch of scientific investigation is surely as necessary at least as in any other, and means should be taken to secure it as indispensable to the right consideration and safe conduct of all matters connected with it. It will be found, therefore, that all sincere and active law reformers have been anxious to promote this object. Without going further back than the present century, we may remind our readers that Jeremy Bentham frequently expressed an opinion as to the benefits to be derived from a publication of this nature. And at a later period that which was only projected by him was brought about by that school of law reformers who derived their chief inspiration from Bentham. The quarterly publication called the *Jurist* was established by them. Some account of this work is given by Mr. Hardy in his *Life of Lord Langdale*.

"The idea," says Mr. Hardy, "of producing a work which should investigate and explain the true principle of legislation and the philosophy of the law, arose with Mr. Bickersteth and Mr. Joseph Parkes. The latter undertook to draw up the prospectus for the work, and afterwards to be the editor of it, until some competent person could be found, whose time was not so occupied as his own, and Mr. Bickersteth, whose engagements prevented him from assisting Mr. Parkes with his pen, contributed 500*l.* to set it going. The first number of the *Quarterly Jurist* appeared in March 1827, and Mr. Roscoe was appointed its editor. He continued to act as such until his engagements and failing health prevented him from attending to the work, and it was deemed advisable to discontinue the publication, and start a new one on an extended scale. Mr. Edwin Chadwick, whose writings on Penal Laws and on a Preventive Police had lately attracted much attention, was applied to by

Mr. Bickersteth to conduct this proposed new series, and arrangements were made to enable him to do so chiefly at Mr. Bickersteth's expense. This new series was to have been started with the support of the late Mr. James Mill, Mr. John Stuart Mill, the late Mr. Sutton Sharpe, and Mr. Bickersteth as contributors and active supporters. The work, however, was not proceeded with on account of Mr. Chadwick's engagements in the Poor Law Commission.

Notwithstanding the high auspices under which the *Quarterly Jurist* was projected and carried on, and the liberal support it received from Mr. Bickersteth, it failed, and its want of success will serve to show the difficulties attending an undertaking of this nature. The sale of a work of this kind must necessarily be limited. It belongs to a class of publications which can hardly be called either useful or entertaining. It can rarely be used as a tool by the daily craftsman nor can it be often taken up to pass a vacant hour. Its subject matter should relate to the most momentous earthly concerns; but unless these can be connected with present interests, feelings, or passions, they are not usually found to move any large number of mankind to pay for instruction as to them. The number of persons therefore willing to purchase a publication of this kind is small. It was not easy therefore to provide for the continued publication of a work of this nature. A topic having temporary interest might occasion the sale of some particular article—an earnest person may be found to contribute not only time but money; but these are not sufficient to carry on a periodical work of any kind, far less a legal periodical. All who have any experience of what this is, know that it is a labour “never ending, still beginning,” constant and harrassing, requiring unwearied patience and a steady supply of funds. Those who simply read the result of such labours monthly or quarterly may suppose that nothing can be more easy than to produce at stated intervals the required number of sheets, that in fact, they “grow” of themselves; but no one who has not gone through it can know the toil, the worry, the vexation of spirit involved in the superintendence, providing for, and bringing out a periodical work. Here then was the diffi-

culty: admitting the use of such a publication, how could it be started and carried on? Other similar works had fallen through, how could a permanent character be given to a new one?

Let us see how this has been so far effected.

The Law Review was commenced in November 1844, shortly after the Law Amendment Society was founded, which was in the beginning of that year; and it is not surprising that the earnest spirits who had called such an Institution into existence should wish to have some separate organ for their opinions and doctrines. The promoters and most active members of the one were the editors and contributors of the other. We are revealing no secrets when we say this: the same spirit was breathed on both the Review and the Society.

Hence arose the adoption of the one by the other. Here, it was said, is a publication which contains a written exposition of our views and wishes. It is important to secure its continued assistance and permanent co-operation. Let us assist it, and it will assist us. We shall secure a means of circulating our views and advancing our opinions, and we are able to do this without any increase in the subscription. "Yes," it was said by some members of the Council, "but is the Society to be bound by all that the Review contains?" "No," it was answered, "this is neither desirable nor necessary. The Reports and Papers of the Society can be published in the Review, but it can also contain articles which are not to be considered as binding on the Society or any of its members, and it can be expressly stated on the wrapper to what extent the Society shall be held to be responsible."

This arrangement then was proposed. Each member who had paid his subscription was to be presented with a copy of the Law Review, to be furnished to the Society at trade price, or about 15s. per annum, and this without any additional burden on the members; a fund was provided, which rose or fell according to the prosperity of the Society, for the necessary expenses of the Review. Thus was provided a means of carrying on a work for the diffusion and investi-

gation of the principles on which the Amendment of the Law should be conducted.

Resolutions were passed by the Council respecting it on the 20th of May, 1846, and the Report founded on them was unanimously adopted by the Society on the 17th of June, 1846.

The resolutions were as follows:—“That the Council are of opinion that it is expedient that greater publicity be given to the Society’s Reports and Proceedings.

“That the publishers of the *Law Review* having intimated to the Council their willingness to publish the Reports of the Society, the Council are of opinion that the offer should be accepted, and the Council propose, with the consent of the Society, to publish such of its Reports and Proceedings as shall appear to be desirable in the *Law Review*, and to present that work to the members, commencing with the current number.” And the Report of the Council was to this effect:—

“Your Council have the satisfaction of stating, that the income of the Society exceeds its present expenditure. We are desirous that, in conformity with the approved practice of almost all other societies, we should endeavour to obtain as extensive a diffusion as possible of the Reports and proceedings of the Society. Having considered whether we should establish a separate publication for this purpose, or avail ourselves of any existing publication, we have come to the conclusion, that it would be both cheaper and more advantageous in the first instance to avail ourselves of an existing publication, if a suitable one could be found willing to forward the views of the Society. We have now much pleasure in announcing, that we have been able to make an arrangement with the publishers of the *Law Review* (which has from its commencement promoted objects similar to those of the Society), by means of which the Reports and proceedings of the Society will be regularly published, and a more permanent record of the proceedings of the Society be maintained. According to this arrangement, the members of the Society will henceforth be presented with the *Law Review*, commencing with the current volume of that work. Our present resources have enabled us to do this. But the larger the funds are which are placed at our disposal, the

more shall we be enabled, by the diffusion of sound information, to promote the objects of the Society."

The Law Review, then, was placed upon this footing,—that while it admits the most free discussion on all matters, the Society is no way bound by any of its articles, until the subject has been referred to a Committee, and has taken the form of a Report or Paper submitted by a Committee to the Society, and was then only bound so far as the rules and practice of the Society provided.

But we need not inform our readers that many schemes of reform when first proposed startle and almost revolt public and more especially professional opinion, but when considered, and sifted, and examined, gradually gain ground, and at last are carried and pass into law. The doors, therefore, for discussion cannot be thrown open too widely; but if the Society and all its members, collectively and individually, are to be bound by every plan of reform, the first time a paper in its support appears, discussion would be effectually quashed. This is so obvious as hardly to need illustration; but one or two Law Reforms may be cited, the history of which may be traced in this Review, which we think will completely establish the conclusion to which we wish to arrive.

Take, for example, the Judge-Master question, which involved the abolition of the Master's office. When this principle was first brought forward in these pages it met but little support. Although its justice could not be denied, yet it was opposed even by many earnest reformers as impracticable. We lost no opportunity, however, of presenting it to our readers in all the forms in our power, in articles, in papers, in reports, and in resolutions; and at length we had the satisfaction of finding it gradually make way, and at length of seeing it completely adopted by the Legislature with all its consequences; and under it the four senior Masters in Chancery have now been dispensed with, they having been permitted to retire with their full salaries, and this practice of the Judge acting as Master and working out his

own decree, assisted by a competent staff of clerks, is now attended with great benefit to the suitor.

Again, the fusion of Law and Equity, which is now making such rapid progress, how was it first received? The first mention that occurs of it in these pages is probably in the notice of Mr. Trower's able pamphlet on the subject, and it was when proposed by him treated as a new fancy. But facts came to the aid of theories. The great apostle of the doctrine came to this country. That which appeared impossible was proved to be in successful operation in America. The judges of that country, when appealed to, testified in its favour. Bit by bit it has been adopted here with great benefit and general applause; and now, when Chief Justices and Lord Chancellors admit that the principle on which it is founded is sound, who can deny that its complete adoption in this country is only a work of time?

Take, further, the establishment of the Encumbered Estates Court, which was brought forward again and again in these pages, until the true principles respecting it were admitted. This measure has regenerated Ireland, and proved that the free transfer of land is a social blessing which cannot be over valued. Still, it must be remembered that many eminent persons doubted the policy of this measure in the first instance, and that by discussion, and discussion alone, this truth has prevailed.

We shall content ourselves with one instance more. The Insurance of Titles, when first proposed at the Law Amendment Society, and brought forward in the *Law Review*, was laughed at as utterly ridiculous; but at length we have found it recommended by a Committee of the House of Commons. It is now receiving daily adhesions, and we believe that its complete adoption is the turning-point on which we shall get rid of our past titles, and be enabled to start with a new root of title.

So much for the past. But are there no questions now pending which stand in the same position as those to which we have alluded did when they were first brought forward?

Take, for instance, codification. Who can say that, in the present state of this question, the Society, or any of its

members, ought to be made responsible for this principle, and yet all its members would admit that this should be fully discussed, and the truth be thus obtained.

Take, again, the new views as to the Reformatory Discipline of Juvenile Offenders. These are gaining ground so fast that we believe that they will soon become law; but in the meantime it would be most unwise to prevent the fullest consideration by rendering the society responsible for every step which is made in the progress of this great means of dealing with crime.

But we think that we have said enough to show that our Review is placed on the right principle; that its connection with the Society increases its stability and gives it a permanent character which could not otherwise be insured; and that in its pages the most free and ample discussion may take place on all subjects connected with the amendment of the law.

The whole subject has, as most of our readers are aware, very recently undergone full consideration, as well in a Special Committee as in the Society at large.

A reference having been made to a Committee, four of its members made a Report, stating their opinion, that the connection between the Society and the Review should be discontinued. This was, however, not satisfactory to the members of the Society, which, after full consideration, came to a different conclusion, and declined to adopt the recommendation of the Report in this respect. We are glad, however, that the matter has been thus considered and brought before the Society, as the true principle with respect to a periodical devoted to the consideration of that matter is now admitted, and will probably not lightly be disturbed.

ART. IV. — TREATISE ON THE CONTRACT OF PARTNERSHIP. By POTHIER.¹

SEVENTH CHAPTER.

*The respective Obligations of Partners ; and the Action
Pro Socio.*

108. THE contract of partnership forms between the partners who are the contracting parties, reciprocal obligations, — whence arises the action called, in the Roman law, *pro socio*, which each partner can bring against the others in order to compel their performance.

The principal objects of these obligations are, 1. That each partner is bound to account to his copartners for whatever he owes to the partnership, after deducting what is due to him by it: 2. That each partner is bound, according to his share in the partnership, to account for what is due to his partners, by the partnership, after deducting what they owe to it. We shall treat, in the two first articles of this Chapter, of these two principal objects: we shall bring together in the third, some other objects of the obligations which partners contract towards each other: then we shall treat, in the

¹ For Chap. I. see 17 L.R. 278; Chap. II. 18 L.R. 157; Chap. III. IV. and V. p. 277; Chap. VI. *anté*, p. 101.

We have thought it useful that a translation of this valuable work with illustrations from our own law should be laid before our readers, not only as supplying a want in our own law libraries, but in anticipation of the adoption of the law of limited liability in this country, which, we think, must sooner or later take place, although the Report of the Commission now sitting be adverse, which seems to be possible.—En.

fourth, of the action *Pro Socio*, which arises from these obligations.

First Article.

As to the different Things which each of the Partners can owe to the Partnership, and for which he is obliged to account to his Copartners.

109. These things are, 1st. what each of the partners has agreed, by the contract of partnership, to contribute thereto, whilst he has not yet done so; 2nd. what each of them has drawn from the common funds for his private use; 3rd. compensation for the damage which by his own fault he has caused to the property or the affairs of the partnership.

§ I. *As to what a Partner has agreed to contribute to Partnership.*

110. It is evident that each of the partners is debtor to the partnership for all that he has promised to contribute thereto.

But when the things he has promised to contribute are certain and specific, if they happen to perish without his fault, and before he has been (*constitué en demeure*) put into default by his partner in bringing them into the partnership, he is discharged from his obligation in the same manner as if he had brought them in. This is conformable with the principles of the law established in my "Treatise on Obligations," part 3. chap. 6., according to which, in all debts of a specific character, the thing due is at the risk of the creditor to whom it is due, and the debtor is released if it has perished, without his fault, and before he has been put into default, in discharging it.

This will be made clear by an example. *James* proposes to his friend *Peter*, a retail wine merchant, to enter into partnership with him in the wine trade; in consequence, they

execute a contract of partnership, to which *Peter* brings a hundred casks of wine which he has in his cellar. *James*, on his side, agrees to contribute thereto, and to place in *Peter's* cellar a hundred other casks of wine, arising from the vintage of a certain (*maison de vignes*) vineyard-house of the said *James*, and which was yet in the cellar of that house, where *Peter* had tasted them; and the parties agree to share in moieties the sum which should arise from that partnership, after first deducting the expenses, and a certain sum which it is agreed *Peter* shall have for his trouble. Afterwards, before *James* is put into default in carrying the hundred casks of wine into the cellar of the partnership, the cellar where they are is struck by lightning, and the greater part is destroyed. That loss having arisen (*par une force majeure*) from unavoidable accident, without *James's* fault, and before he is put into delay, ought to fall upon the partnership, and not upon *James* alone, who, by carrying into the partnership cellar what escaped from the lightning, will discharge his obligation in the same way as if he had carried the whole. But if that accident of the lightning does not happen until after *James* is put into delay, by a judicial summons which *Peter* serves upon him, to carry into the cellar of the partnership the hundred casks of wine which he binds himself to carry there, the loss, in that case, will not fall upon the partnership, which ought not to suffer from the wrongful delay of *James*; and, notwithstanding the accident, *James* remains debtor towards the partnership for the hundred casks of wine which he agrees to contribute thereto. See my "Treatise on Obligations," n. 649.

111. It is only in the shape of damages for the loss which the partner occasions to the partnership by his delay in contributing certain things thereto according to his agreement that he remains a debtor for those things, although they have perished by unavoidable accident. It is for this reason that he ought to remain a debtor in that case only, in which the thing either has not entirely perished, or has not perished, until after the partnership would have had time to resell it, if he had not been in delay in satisfying his obligation; as in the preceding case, in which the hundred casks of wine which the

lightning destroyed in the cellar of *James* would not have perished if they had not been there, and they had been in the cellar of the partnership, where *James* had been put into default in bringing them.

But if the loss of specific things which a partner has agreed to bring to the partnership (although it has happened after he has been put into default in bringing them into it) would have been sustained by the partnership, even although he should have fulfilled his obligation, the partnership, in that case, not suffering from the delay, the loss of the thing ought not to fall upon that partner alone, but upon the partnership to which it was owing. For example, if I enter into a commercial partnership with several persons for a trade in the refining of sugar, to which, amongst other things, I agree to furnish a certain warehouse belonging to me, to be the common property of all the partners, and after I am put into default, in delivering the keys of it to the manager of the partnership, the warehouse is burnt by lightning, that loss, although it has happened since my delay in fulfilling my obligation, will fall upon the partnership, which would equally have sustained the loss if I had fulfilled my obligation, and I shall be discharged from it by putting the partnership in possession of the place and the materials which remain, in order that the warehouse may be rebuilt at the expense of the partnership.

112. Nothing that has been said as to the extinction of things which a partner has agreed to bring to the partnership has any application except when these things are certain and specific subjects.

But when that which a partner has agreed to bring to a partnership is a certain sum of money, or a certain quantity of wheat, wine, &c., or indefinite subjects, as so many cows, without mentioning what cows, it is clear, that such questions cannot arise, as there can be no extinction of that which is indefinite; *genus nunquam perit*. See my "Treatise on Obligations," n. 658.

This will be sufficient for deciding the following case. Suppose that we entered into a partnership to go and buy in different provinces certain merchandise, which we propose

to bring here to resell, and we each of us agree to contribute a thousand crowns to that partnership. If before fulfilling that agreement thieves forced open your strong box, and robbed you of the thousand crowns which you destined for the partnership, that loss will not fall upon the partnership, because the moneys of which you have been robbed not only did not belong to the partnership, but it cannot even be said that you were robbed of those very moneys of which you were debtor to the partnership. Hence the robbery which has befallen you cannot procure you a discharge from the thousand crowns which you have agreed to bring into the partnership.

But if, having set out to trade, in execution of your contract of partnership, you had taken that sum with you, and a person had robbed you on the way, the loss will fall on the partnership; for you will be considered to have paid the partnership the sum of one thousand crowns which you owed to it by carrying with you those moneys for the journey made on account of the partnership. These moneys thereby became the moneys of the partnership, the robbery of which ought consequently to fall upon it. *Celsus tractat: si pecuniam contulissemus ad mercem emendam, et mea pecunia perisset, cui perierit ea? Et ait: si post collationem evenit ut pecunia periret, quod non fieret nisi societas coita esset, utrique perire; ut puta, si pecunia, cum peregre portaretur ad mercem emendam, periit: si verò ante collationem, posteaquam eam destinasses tunc perierit, nihil eo nomine consequeris, inquit; quia non societati periit; l. 58. § 1. ff. Pro Soc. (Dig. lib. xvii. tit. 2. l. 58. § 1.)*

113. Although a partner has brought things into the partnership according to his agreement, if, afterwards, the partnership (*en a été evincée*) has been dispossessed of them, he remains its debtor, as though he had not brought them into it; arg. l. 3. ff. *De Act. Empt.* (Dig. lib. xix. l. 3.); for the contract of

¹¹³ Each partner is debtor to the partnership for all that he has promised to bring therein: when such contribution consists of a certain thing, and the partnership is evicted therefrom, the partner is surety therefor to the partnership, in the same manner as a vendor is to his purchaser. Civ. Cod. of France, 1845.

partnership, like that of sale, being commutative or bilateral, the partner who thereby agrees to contribute some certain and specific object, contracts towards the partnership the same obligation of warranty, in case of the dispossession of that thing which he has brought into the partnership, as a vendor contracts towards a purchaser. See what I have said in my "Treatise on the Contract of Sale," 2, 3, and 4.

114. In universal partnerships of all goods, there is no warranty in case of eviction from any of the estates of which one of the partners was possessor at the time of the contract, for in these partnerships, it is his property in general, and not any specific estate, which each partner binds himself to bring into the partnership.

115. When the things which one partner has agreed to bring to the partnership produce fruits or profits, he is debtor to the partnership not only for such things, but also for all the fruits which he has taken from them since the time when they ought to have been brought into the partnership. *In societatibus fructus communicandi sunt* ; l. 38. § 9. ff. *De Usur.* (Dig. lib. xxii. tit. 1. l. 38. § 9.)

As long as he has not been put into default in bringing the things which he has promised into the partnership, he is only bound to account for such of their fruits as he has taken. But after he has been put into delay, he is bound to account even for those which he has not taken, and which the partnership had the right to take. Because it is an effect of the default to oblige the debtor to indemnify his creditor for all that he has suffered by his delay.

116. When a partner has agreed to bring a sum of money into partnership, he will owe interest to the partnership from the day he was put into default by his partners in bringing it in, in the same manner as any other debtor.

117. When a partner has not promised to bring property

¹¹⁷ The partner who is bound to contribute a sum to the partnership, and who has not done so, becomes, absolutely and without demand, debtor for the interest of such sum, computing from the day on which it ought to have been paid.

It is the same with regard to sums which he has taken from the partnership chest, computing from the day on which he took them for his private use.

itself into a partnership, but only its use and enjoyment, it is clear that he is not, in such case, debtor for it to the partnership; but only for the fruits or interest, according to the distinctions above set forth.

§ II. *As to what each of the Partners has withdrawn from the common Funds.*

118. Each of the partners ought to restore to the common stock all that he has withdrawn from it; and he is consequently answerable for it to the partnership.

For example, if one of the partners has taken from the partnership chest a sum of money, in order to employ it in his private affairs, it is clear that he is a debtor for that amount to the partnership.

119. He owes also interest for it, according to the law, 1. § 1. *ff. De Usur.* (Dig. lib. xxii. tit. 1. § 1.) *Socius si ideò condemnandus erit, quod pecuniam communem invaserit, vel in suos usus converterit, omnimodò, etiam morà non interveniente, præstabuntur usuræ.*

In universal partnerships, into which all the revenues of the property of each of the partners fall, although the ownership is not common, such as is that which takes

The whole without prejudice to more ample damages, if there be any grounds. Civ. Cod. of France, 1846.

So, according to our law, a partner is debtor to the firm for what he has agreed to contribute thereto; thus, in *Akhurst v. Jackson*, 1 Swanst. 85., a sole trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees were held to be entitled, at the respective periods, to receive the remaining instalments. And see *Coll. Partn.* 141.; *Stor. Partn.* 302.

¹¹⁸ See Civ. Cod. of France, 1846, *antè*, 117. note. According to our law each partner has a specific lien on the present and future property of the partnership, for all debts due to the firm for moneys abstracted by any other partner from such stock and funds beyond his own share, and the stock and funds so taken, if identified, are applicable to the payment of what, upon an account taken, is due from him to the partnership, before any of it can be applied to the payment of his debts due to his private creditors. *West v. Skip*, 1 Ves. 139. 240. 242.; *Skip v. Harwood*, 2 Swanst. 586.; *Croft v. Pyke*, 3 P. Wms. 180.; *Coll. Partn.* 77. 178.; *Stor. Partn.* 137.

place between persons joined by marriage, the interest of the sums which one of the partners has taken from the common chest for his private affairs only commences to run from the day of the dissolution of the community; as long as it lasts, there is a confusion of that interest, which is a charge on the revenues of the property of that partner, which fall into the partnership.

120. Each of the partners obliging himself to bring into the partnership his industry, the industry of each becomes a common capital; and all the gains that each has made thereby ought to be accounted for and brought into the common fund.

In universal partnerships, each of the partners ought to account to the partnership for all the honest gains which he has made by his industry of every kind; but in particular partnerships, each partner being considered to bring into the partnership that kind of industry only which has relation to the object of the partnership, he ought to account to the partnership for the gains only which arise from that kind of industry, and not for those which may arise from any other.

For example, if two shoemakers contract together a partnership in their craft for a certain time, each of these partners will be bound to account to the partnership for all the profits which he may have made by his craft as shoemaker. But if

²⁰ The partners who are under an obligation to bring in their industry to the partnership, owe to it an account of all the profits which they have made by the kind of industry which is the object of such partnership. Civ. Cod. of France, 1847. Our law is similar, and a Court of Equity will prevent partners from thus failing in their duties to each other. "The principles of Courts of Equity," observes Sir John Leach, "will not permit that parties, bound to each other by express or implied contracts to promote an undertaking for the common benefit, shall any of them engage in another concern which necessarily gives them a direct interest averse to that undertaking. For example, there is necessarily some danger of rivalry between a morning and an evening paper, especially in the country. It might clearly, therefore, be made a question, whether it would be a due act of management in the partnership concern of a morning paper to assist, with its property and its labour, the publication of any other newspaper so as to enable the majority of the partners in that respect to bind the minority." *Glassington v. Thwaites*, 1 S. & S. 193. In this case, however, it was held that a temptation to abuse the partnership property was not sufficient to induce the Court to interfere by injunction. See also *Burton v. Wookey*, 6 Madd. 367.; and see *England v. Curling*, 8 Beav. 129.; Coll. Partn. 121.

one of them were possessed of the talent of teaching birds to sing, he will not be obliged to account to the partnership for the gains which he may have made thereby whilst he worked, because it is not this kind of industry, but only that which has relation to his craft of shoemaker, which he has promised to bring into the partnership.

121. When one of the partners has a debt due to him in his private capacity from a person who is also a debtor of the partnership, he ought to appropriate what he receives to the credit of the partnership and himself, in proportion to the amount of each debt.

For example, if the partnership was a creditor of *Peter* for a sum of 2000 livres, and one of the partners was the private creditor of the same *Peter* for another sum of 1000 livres, the debt due to the partnership being double the private debt due to that partner, he ought to account to the partnership for two-thirds of what he may receive from *Peter*, as he will be considered to have received these two-thirds on account of the debt of the partnership; even if, by the receipt which he may have given for it, he have appropriated it entirely to the account of his own private debt; for as he owes to the affairs of the partnership the same care as to his own private affairs, it is not allowable for him to obtain payment of his own debt preferably to that of the partnership.

122. When one of the partners has obtained payment from a debtor of the partnership of the whole of his share of the debt, and has given him a receipt for his share; if that debtor afterwards becomes insolvent, and the other partner cannot

¹²¹ When one of the partners is, on his own private account, a creditor for a sum due from a person who also owes to the partnership a sum equally due, what he receives from such debtor must be appropriated in payment of the debt due to the partnership and to himself, in the proportion of the two debts, although he may in his receipt have directed the whole sum to be appropriated in payment of the debt due to himself; but if he have expressed in his receipt that it shall be appropriated entirely in payment of the debt due to the partnership, such stipulation shall be executed. Civ. Cod. of France, 1848.

¹²² When one of the partners has received the whole of his share of a common debt, and the debtor has subsequently become insolvent, such partner is bound to bring back what he has received to the common stock, although he may have specially given a receipt for his share. Civ. Cod. of France, 1849.

be paid his share in full, will the partner who has received the whole of his share be bound to bring into the common stock what he has received more than the other? For the negative, it may be said that what that partner has received from the debtor of the partnership does not come to him from the common stock, but from his share in one of the effects of the partnership: *non de medio tulit, sed tantummodò quod sibi pro parte socii debebatur recepit*; the other partner ought to blame himself for not having been equally vigilant in requiring his.

Notwithstanding these reasons, *Ulpian*, in the law 63. § 5. *ff. Pro Soc.* (Dig. lib. xvii. tit. 2. l. 63. § 5.) decides that such one of the partners who has received the whole of his share ought to bring into the common stock what he has received more than the other partner, *quasi iniquum sit, ex eadem societate, alium plus, alium minus consequi*.

This appears contrary to what is decided between coheirs in the law 38. *ff. Fam. Ercis.* (Dig. lib. x. tit. 2. l. 38.); but there is no analogy between the two cases. In supposing, in the case of the former law (63.), that the partners had a reciprocal power (as is often the case) to act one for another in the affairs of the partnership, and to compel, one on behalf of the other, payment by debtors; in that case, a partner ought to bring into the common stock what he has received from that debtor, because, it being his duty to require it on account of the partnership, he ought not to have preferred his own private interest to that of the partnership. In the case of the law 38., the coheirs had not contracted a similar engagement between themselves. For the same reason, if one of the partners meeting with an opportunity of selling advantageously the goods of the partnership, instead of making a bargain on account of the partnership, makes one on his own private account, by selling his share in the goods of the partnership, he will be obliged to bring back into the common stock what he has sold for his own share more than the other partner has sold of his.

It would be otherwise, if one of the partners had sold his share in a thing belonging to the partnership which was not intended to be sold for its profit; although the other partner

had sold less of his than he has, he will not be obliged to account to him for what he has sold more than such partner has.

123. Each of the partners is bound to bring to the common stock the profits only which come to him from the partnership, and not those of which the partnership has been only the accidental cause. For example, if one of the partners, in doing the business of the partnership, has formed an acquaintance with a rich and liberal person, whom he would not otherwise have known, and such person whose friendship he has gained, *confers upon him* some donation or legacy, he will not be obliged to bring it into the common stock, although the partnership has been the accidental cause of his obtaining it. *Sed nec compendium quod propter societatem ei contigisset, veniret in medium, veluti si propter societatem hæres fuisset institutus, aut quid ei donatum esset ; l. 60. ff. § 1. Pro. Soc. (Dig. lib. xvii. tit. 2. l. 60. § 1.)*

§ III. *Of the Loss that one Partner has caused to the Partnership.*

124. Among the liabilities for which a partner is accountable to the partnership, there must be comprehended the sums to which the estimate of the damages caused by his fault to the effects or affairs of the partnership amounts.

Each of the partners is bound in this respect only for an ordinary fault, and not for the lightest fault. There can only be required from him the care of which he is capable and which he applies to his own affairs. If he has not the same foresight which the most able men display in their affairs, his partners cannot impute blame to him, but rather to themselves for having entered into partnership with him: *Culpa non ad exactissimam diligentiam dirigenda est ; sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet ; quia qui parùm diligentem sibi socium acquirit, de se queri debet dict. leg. 72. ff. Pro Soc. (Dig. lib. xvii. tit. 2. l. 72.)*

A partner is moreover liable even for faults of omission, as if, for example, by an inexcusable fault, he has failed to make

a purchase advantageous to the partnership: *Si qui societatem ad emendum coierint, deinde res alterius dolo vel culpâ empta non sit, pro socio esse actionem constat*; l. 52. § 11. ff. Dict. Tit. (Dig. lib. xvii. tit. 2. l. 52. § 11.)

Can a partner excuse himself even for gross negligence, if it is clear that he is equally negligent in his own affairs? No: if there is not required from a partner, for the affairs of the partnership, the most exact care such as the most able men (*pères de famille*) display in their affairs, it is because he is incapable of such care. But each person is presumed to be capable of that ordinary care which the least intelligent persons exhibit in the management of their own affairs; and when he does not exercise such care it is presumed that it is from voluntary and culpable indolence, for which, in truth, he is not accountable to any one with regard to his own private affairs, but for which he is accountable to his partners, when he has been guilty of that indolence in their common affairs.

125. It remains to observe that a partner cannot excuse himself from accounting to the partnership for the loss which he has caused by his fault in any affair, by setting off against it profits to a more considerable amount which he has made for the partnership by his industry in other affairs: *Non ob eam rem minus ad periculum socii pertinet quod negligentia ejus periisset, quod in plerisque aliis industria ejus societas aucta fuisset et hoc ex appellatione Imperator pronuntiavit*; l. 25. ff. Dict. Tit. (Dig. lib. xvii. tit. 2. l. 25.). *Et ideo, si socius quædam negligentè in societate egisset, in plerisque autem societatem auxisset, non compensatur compendium cum negligentia*: l. 26. The reason is, that as such partner owes to the partnership his industry, he has only discharged his duty by bringing thereto the profits which he has made by his industry; the partnership owes him nothing which he can set off against what he owes to it.

¹²⁵ Each partner is bound towards the partnership for damages occasioned by his own fault, without being able to set off against such damages the profits which his skill shall have procured for it in other affairs. Civ. Cod. of France, 1850. See Stor. Partn. 261—264.

Second Article.

As to the Things for which a Partner may be Creditor of the Partnership, and for which the other Partners are obliged to account to him, according to his Share in the Partnership.

126. When a partner has put things into the partnership the enjoyment or use whereof alone he owed by the Contract of Partnership, he is creditor of the partnership for such things which ought to be restored to him at the dissolution of the partnership.

If they consisted of certain and specific things which are not consumed by use, nor intended to be sold, and which he has a right to receive in kind at the dissolution of the partnership, these things remain at his risk, and not at the risk of the partnership. If, without the fault of his partners, they have deteriorated, he will receive them in the state in which they are, and if they have entirely perished by (*force majeure*) unavoidable accident, the partnership will be discharged of the obligation of restoring them to him.

On the contrary, if the things a person has put into a partnership are such as consume or deteriorate by keeping, or were intended to be sold, and had been put into the partnership, at a certain estimate contained in some inventory, the partner who has put them into it, in order that the partnership should have only the enjoyment thereof, is creditor, not for the things themselves, but for the sum at which they have been valued; and these things are not at his risk, but at that of the partnership.

127. A partner moreover may be creditor of the partner-

¹²⁶ If things of which the enjoyment only has been put into the partnership are certain and determinate objects, which do not consume by use, they are at the risk of the partner who is the owner.

If such things do consume by use, if they deteriorate by keeping, if they were intended to be sold, or if they were put into the partnership at a valuation contained in an inventory, they are at the risk of the partnership.

If the thing was valued, the partner can only recover the amount of the valuation. Civ. Cod. of France, 1851.

¹²⁷ A partner can maintain an action against the partnership, not only on

ship for sums which he has disbursed in its affairs; for instance, for the expenses of journeys which he has made for the said affairs: l. 52. § 15. ff. *Dict. Tit.* (Dig. lib. xvii. tit. 2. l. 52. § 15.)

Not only if he has made disbursements, but if he has contracted any obligation for the affairs of the partnership, he ought to be indemnified by the partnership.

For example, if one of the partners sell to any one property belonging to and on account of the partnership, he ought to be indemnified by it from the obligation of warranty which he has contracted towards the purchaser; l. 67. ff. *Dict. Tit.* (Dig. lib. xvii. tit. 2. l. 67.)

128. A partner ought to be indemnified by the partnership, not only for the disbursements which he has made and the obligations which he has contracted directly and as principal for the affairs of the partnership; he ought equally to be indemnified from the risks and hazards which he has incurred, when they were unavoidable, in carrying on the affairs of the partnership, and he only incurred them for the said affairs: because the partnership, being entitled to all the profits which result from his exertions, it is equitable that it should bear all the risks: *ubi lucrum, ibi et periculum esse debet*. This has given rise to the question, which has been agitated among the jurisconsults of the two sects,—namely, whether one of the partners, having been wounded by the slaves whom he took to sell at a market on account of the partnership, in endeavouring to hinder them from escaping, ought to be indemnified by the partnership for the expense of dressings and medicaments made use of for his cure. *Labeo*, chief of the school of the *Proculeans*, held the negative, because these expenses were not incurred for the affairs of the partnership, which have been only the accidental cause of them; “*quia*,” says he, “*id non in societatem, quamvis propter societatem, impensum sit*,” l. 60. § 1. (Dig. lib. xvii. tit. 2. l. 60. § 1.)

On the contrary, *Julianus*, who was of the school of the

account of sums which he has disbursed for it, but also on account of obligations which he has contracted *bonâ fide* in the affairs of the partnership, and for risks inseparable from their management. Civ. Cod. of France, 1852. See Stor. Partn. 282.; Coll. Partn. 130. 142. 151.; Thornton v. Proctor, 1 Anst. 94.

Sabinians, held the affirmative, and his opinion has prevailed: *Secundum Julianum tamen, et quod medicis pro se datum est, recipere potest; quod verum est*; l. 61. ff. *Dict. Tit.* The reason is, that the risk incurred by that partner of being maltreated by the slaves, was a risk inseparable from their convoy, which he only incurred for the affairs of the partnership, and from which he ought consequently to be indemnified by the partnership.

For the same reason, the same *Julianus* decides that if a partner, in a journey which he makes for the affairs of the partnership, has been attacked by robbers, who have robbed him and wounded his servants, the partnership ought to indemnify him for what he has lost, and the expense which he has incurred for the cure of his servants; l. 52. § 4. ff. *Pro. Soc.* (Dig. lib. xvii. tit. 2. l. 52. § 4.)

129. Observe that the partnership, being bound only by the risks which are inseparable for the carrying on of its affairs, it is liable in the above-mentioned case only to indemnify the partner for the robbery of what it was absolutely necessary, having regard to his condition, that he should take with him on his journey. If he had taken with him more money than was necessary, and things which he might have dispensed with, the partnership ought not to bear the risk of that superfluity, or to indemnify the partner if he has been robbed of it.

In like manner, if he has taken with him too great a number of servants, the partnership is only bound for the cure of the wounds of those who were necessary to him for his journey.

130. If the partner, who had taken with him more money than he needed for the journey, has saved a part of it from the hands of the robbers, shall he reckon what he has saved as that part of his money which was necessary for the journey, and which was at the risk of the partnership, or as the superfluous part which was at his own risk? I think that there being no reason for considering it to be one rather than the other, it ought to be reckoned as part of each in proportion. For example, if a partner who had only need of ten pistoles for his journey took thirty with him, and saved six

of them, the partnership, which was only charged with the risk of a third of the thirty pistoles, ought to profit only by the third of what has escaped the robbers, and it ought consequently to indemnify that partner for eight pistoles.

131. The partnership is, in fact, bound to indemnify a partner for the losses which he has suffered, when they are a natural consequence of certain hazards inseparable from the carrying on of the affairs of the partnership, to which his partners would be exposed in like manner if they had charged themselves therewith; but it is not obliged to indemnify him for losses which he has suffered, and of which the carrying on of the affairs of the partnership has only been a purely accidental cause. For example, if the partnership has had a lawsuit with a person who was a friend of one of the partners, and that person, being provoked by it, revoked a legacy which he had bequeathed to him, or caused him to lose a commission which he had procured for him, although that partner has suffered these losses in consequence of the partnership, there is no ground for any claim of indemnity from the partnership.

In like manner a partner cannot claim an indemnity from the partnership, upon the ground that the care which he has taken in the affairs of the partnership has caused him to neglect his own private affairs, because he owed to the affairs of the partnership the care which he has brought to it, and he has been paid for it by the share which he has had, or might have had, in the profits of the partnership. This is conformable to what *Labeo* decides in the law 60. § 1. (Dig. lib. xvii. tit. 2. l. 60. § 1.) that it is not due for the indemnity of a partner: *si propter societatem eum heredem quis instituere desisset; aut legatum prætermisisset, aut patrimonium suum negligentius administrasset.*

132. It remains to be observed, with regard to what is due from the partnership to any one of the partners, that each of his co-partners is bound to him only according to his

¹³¹ So in our law, unless, under some special agreement, a partner can claim no compensation for his care and trouble in the affairs of the partnership. *Whittle v. McFarlane*, 1 Knapp. 312.; *Burden v. Burden*, 1 V. & B. 170. Cell. Partn. 130. 142. 151.; *Stor. Partn.* 183. 282.

share in the partnership, when they are all solvent. But if there are any of them insolvent, the equality which ought to exist between partners does not allow that the partner who is creditor of the partnership should bear alone the loss resulting from their insolvency, and it ought to be apportioned between him and his solvent partners: *Proculus putat hoc ad cæterorum onus pertinere, quod ab aliquibus servari non potest quoniam societas quum contrahitur tam lucri quam damni communio initur*; l. 67. (Dig. lib. xvii. tit. 2. l. 67.) For example, amongst four partners, each for a fourth, one is creditor of the partnership for 1200 livres, another is insolvent; each of the two solvent partners owes in that case the sum of 300 livres in respect of the fourth, for which he is liable (*de son chef*) on his own account, and 100 livres for his third of the share for which the insolvent is bound.

Third Article.

As to other kinds of Obligations which arise from the Contract of Partnership.

133. It is, moreover, one of the obligations which arises from the contract of partnership, that each of the partners is obliged to allow the others the enjoyment and use of the common property, to which they are entitled according to the regulations and agreements of the partnership; l. 52. § 13. *ff. Pro Soc.* (Dig. lib. xvii. tit. 2. l. 52. § 13.)

For example, when at *Paris*, two neighbours enter into partnership, in order that they may have in common an equipage, each of them is obliged to allow the enjoyment of it to the other in his turn. If on the day when it is my turn my partner had need of it for business which could not be put off, and I had need of it only for business which could easily be put off, I ought to allow my partner to use it, upon condition that I should use it another day when it was his turn. The laws of fraternity and of friendship which ought to exist among partners require this.

It is also one of the obligations which arise from the con-

tract of partnership, that each of the partners is obliged to contribute to the repair and preservation of the common property. They may, nevertheless, discharge themselves therefrom by offering to abandon it. See what has been said *suprà*, n. 86.

Lastly, one of the principal obligations which each partner contracts by the contract of partnership, is to submit to the distribution of the partnership effects at the termination and dissolution of the partnership. We shall treat of that distribution *infra*, in the ninth chapter.

Fourth Article.

Of the Action Pro Socio.

134. From the obligations which arise out of the contract of partnership arises the action *pro socio*, which each of the partners can maintain against his copartners, in order to compel their fulfilment.

This is a personal action: it passes to the heirs and other universal successors of each of the partners, who can maintain that action; and it may be brought against the heirs and other universal successors of the partners, who are bound by it.

We have seen in the preceding articles who were the objects of that action.

135. That action, with regard to *its principal object*,

¹³⁸ The proceedings in Equity in partnership matters are in many respects similar to those under the action *pro socio*. Stor. Partn. 324. note.

In the first place every application to a Court of Equity by one of the partners for an account against his copartners, must be made either on a dissolution having already taken place, or upon grounds sufficient for demanding the dissolution of the partnership, and consequently of the distribution of the partnership effects. Stor. Partn. 325.; Coll. Partn. 174. 193.

But a Court of Equity will interfere during the continuance of the partnership, for particular purposes, not contemplating a dissolution or distribution of the effects. It will, for instance, decree the specific performance of an agreement to enter into a partnership for a fixed and definite term (Anon. 2 Ves. 629.; Buxton v. Lister, 3 Atk. 385.; England v. Curling, 8 Beav. 129.); but it will not where no term has been fixed, for such decree would be useless, as either of the parties might dissolve the partnership immediately afterwards.

namely, the distribution of the capital of the partnership, can only be maintained from the time of the dissolution of the partnership; and it is of that the law says, *Actione societas solvitur*.

It can be maintained, with regard to *particular objects*, during the time that the partnership lasts, for instance, against such one of the partners who retains all the profits of the partnership, to make him share it with the others, l. 65. § 15. *ff. Pro Soc.* (Dig. lib. xvii. tit. 2. l. 65. § 15.); and that he may be compelled, for that purpose, to give a short statement of the accounts, as also to allow the enjoyment of the common property, and to contribute to necessary repairs.

136. It is peculiar to the action *pro socio*, whether it be commenced during the partnership or after its dissolution, that each of the parties, whether the plaintiff or one of the defendants, has a right to demand that the cause and the parties should be sent before arbitrators, to settle all the disputes with regard to the accounts and the distribution of the partnership effects, and generally with regard to all the objects of that action.

For this end, the Ordonnance of 1673, *tit. 4. art. 9.*, provides that all contracts of partnership should contain the clause of submission to arbitration upon all disputes which may arise amongst partners on account of the partnership, and that where that clause has been omitted, it should be supplied.

These arbitrators must be agreed upon, and named by the parties; and in default of one naming them, the Judge will name one for him. Ordonnance of 1673, *ibid.*

Hercy v. Birch, 9 Ves. 357. It has, however, been suggested by Mr. Swanston, in his learned note to *Crawshay v. Maule*, 1 Swanst. 513., that in many cases, although the partnership could be immediately dissolved, the performance of the agreement, like the execution of a lease, after the expiration of the term (*Nisbett v. Meyer*, 1 Swanst. 226.), might be important as investing the party with the legal rights for which he contracted. But even where there has been an agreement for a partnership for a fixed and definite term, the Court cannot enforce it, when the amount of capital, and the manner in which it is to be provided, is undefined, and the mode of carrying on the business is discretionary. *Downs v. Collins*, 6 Hare, 437.

If, before the arbitrators have given their award, one of the arbitrators happens to die, the Ordonnance provides that the party who has named him shall name another in his place, or the Judge, on his refusal. (Art. 10.)

137. When the arbitrators do not agree, they can, without

^m Every dispute between partners on account of the partnership, shall be adjudicated upon by arbitrators. Com. Cod. of France, 51.

There shall be an appeal from the judgment of the arbitrators, or (*au pourvoi en cassation*) it shall be reviewed by the Court of Cassation, unless there has been a stipulation to the contrary. The appeal shall be heard before the Cour Royale. Ib. 52.

The arbitrators are nominated by an act under private signature; by a notarial act; by an extrajudicial act; by a consent given in a Court of Justice. Ib. 53.

The time for the award is fixed by the parties at the time of the nomination of arbitrators; and if they do not agree as to the time, it shall be fixed by the Judges. Ib. 54.

In case of the refusal of one or more of the partners to nominate arbitrators, the arbitrators shall be nominated by the Tribunal of Commerce. Ib. 55.

The parties produce their documents and memoranda, without any legal formalities, to the arbitrators. Ib. 56.

The partner who delays to produce the documents and memoranda, shall be summoned to do so within ten days. Ib. 57.

The arbitrators, according to the exigency of the case, can extend the time for the production of documents. Ib. 58.

If the time be not extended, or if the extended time have expired, the arbitrators adjudicate upon the documents and memoranda produced. Ib. 59.

In cases of distribution (of the partnership effects) the arbitrators nominate an umpire, if he has not been nominated by compromise. If the arbitrators cannot agree in their choice, the umpire is to be nominated by the Tribunal of Commerce. Ib. 60.

The adjudication of the arbitrators must (*motivé*) set forth its grounds. It must be deposited with the registrar of the Tribunal of Commerce. It is rendered executory without any modification, and transcribed in the registers, by virtue of an order of the president of the Tribunal, who is bound to issue it, without any reserve, within three days from the deposit with the registrar. Ib. 61.

The above-mentioned provisions are applicable to the widows, heirs, or assigns of partners. Ib. 62.

If minors are interested in a dispute on account of a commercial partnership, the tutor cannot renounce the right of appeal from the award of the arbitrators. Ib. 63.

In England a Court of Equity will not decree specific performance of a covenant to refer disputes to arbitration (*Price v. Williams*, cited 6 Ves. 818.; *Street v. Rigby*, 6 Ves. 818.; *Wilks v. Davis*, 3 Mer. 507.); and a plea of an agreement to refer to arbitration would not constitute a valid objection to a bill, either for discovery or relief (*Wellington v. Mackintosh*, 2 Atk. 569.;

the consent of the partners, take a third; and if they cannot agree in their choice, the Judge will name one. (Art. 11.)

The arbitrators can give their judgment on the documents and (memories) written statements or pleadings of the parties in their absence. (Art. 12.)

These sentences ought to be (homologuées) registered at the consulate, when the partnership is a trading or banking partnership; if not in the ordinary jurisdiction. (Art. 3.)

ART. V.—THE STATUTE LAW COMMISSION.

First and Second Reports of Mr. BELLENDEN KER to the Lord Chancellor on the Proceedings of the Board for the Revision of the Statute Law. 1854.

It is related of one of the Roman Emperors that the more effectually to ensnare the people, he had his laws written out in small characters, and affixed on high pillars. Scarcely less cruel has been the conduct of the legislators of this country. It has been their wisdom to bury our laws out of sight in an incongruous mass of statutes, the exuviae of many generations. Some of these statutes are in force, and some effete; some part in operation, and part repealed; some fenced in with provisos, others patched up with amendments; some wanting a clause, others with but one surviving clause; some with mere clerical errors, others vitally deficient. One great fault lies at the root of our whole modern system of legislation.

Street v. Rigby, 6 Ves. 815., overruling *Halfhide v. Fenning*, 2 Bro. C. C. 336.; nor will the Court substitute the Master for the arbitrators; "for this," observed Sir J. Leach, M. R., "would be to bind the partners contrary to their agreement." *Agar v. Macklew*, 2 S. & S. 418.

It seems to be doubtful how far an action will lie at law for breach of such a covenant (*Kill v. Hollister*, 1 Wils. 129.), or, at any rate, how other than nominal damages can be obtained (2 Bos. & Pull. 186.). Covenants, however, to refer to arbitration may be made effectual by naming a sum as liquidated damages, to be paid by the party refusing to submit to arbitration. *Street v. Rigby*, 6 Ves. 818.; *Astley v. Weldon*, 2 Bos. & Pull. 346.

It is that men's minds are puzzled and harassed with the needless tautology, and often barbarous jargon, in which most modern statutes are worded,—verbiage which tempts and almost invites human weakness to escape from it, or to evade it. Our laws should, instead, be framed and worded with all proper caution, but with some attention to the dictates of common sense, now too frequently outraged, avoiding that profusion of words, which is not less fatal now than it was when Juvenal wrote—

——— “*Torrens dicendi copia multis,
Et sua mortifera est facundia.*”¹

They would then appeal at once to men's consciences, and to their good faith, as Cicero² defines it, in the spirit, not in the letter; “*semper autem in fide, quid censeris, non quid dixeris cogitandum.*”

Even in the statutes of last Session there is little attempt at order or arrangement. For instance, there are three statutes on lunacy, three on the customs, three on the poor and poor rates, three on Parliamentary elections, two for the Militia, for the most part placed in disregard of all internal connection. Why must we search two separate Acts for the duties on horses, and even for so small a matter as cab fares? No wonder that those who are unacquainted with these little legislative peculiarities should fall into error.³

Who would imagine that an Act of twenty-two sections relating almost entirely to hackney carriages and their fares, did not contain all enacted in the same Session on those points, but was afterwards qualified and altered in an important manner by sections thrust pell-mell into another statute passed in the very same Session? Is the omnipotence of Parliament unequal to the addition of a proviso, or to the correction of an oversight, or even of a mere clerical error

¹ Juv. 10. sat. 10.

² De Offic. 1. c. 13. s. 6.

³ No wonder then that month after month ever since the alteration of cab fares by 16 & 17 Vict. cc. 33. and 127., no account has been taken of the latter statute, which alters c. 33. in several important particulars, by that usually correct, but severe book, Bradshaw's Railway Guide. It has at length, (March 1854) blundered into the right statement.

in a statute, without perpetuating the blunder by incumbering the Statute Book, or disfiguring another statute? Why does not Parliament exercise its acknowledged power of appealing or recalling during the Session any statute passed during that Session, and requiring, as statutes sometimes must, any alteration or addition, and of entirely reframing or perfecting it when requisite.

We alluded recently ¹ to the proposed establishment of a Court consisting of three Commissioners to conduct private business, and to revise and settle Private Acts of Parliament. It is said to be proposed to subject all statutes to some such preliminary ordeal. But, in the event of the appointment of a Minister of Justice, these matters would seem to fall legitimately within the province of such an officer. He might also preserve us from ever again falling into such a slough of despond.

As regards our hope of extricating ourselves from our legal labyrinth, the appointment of a Statute Law Commission has given us sincere pleasure. Yet we cannot profess ourselves quite satisfied, for reasons we have already explained at length ², either with its constitution, or with its labours, as a whole. The staff was, in our opinion, much too small for the efficient carrying out of so large and important a work; Justinian's commission, entrusted with the preparation and compilation of the Codex, Pandects, and Institutes, consisted of ten picked men, lawyers of well-known ability and experience. Their instructions empowered the Roman commissioners, in the preparation of the Digest, to omit all unnecessary preambles, repetitions, contradictions, and obsolete matter; to express the laws in brief language, placing them under appropriate titles, and to add to, take from, or vary, the words of the old constitutions when necessary. They completed the work between the years 528 and 532, in little more than four years, except that the Codex was revised and appeared in its amended form in 534. The whole was declared to be law not capable of modification by interpretation, or even by fresh editing, and by nothing in fine but

¹ 18 L. R. p. 440.

² 19 L. R. p. 111.

Imperial Decrees. We want to see some "exquæstors" (ex-Chancellors), Proctors, and Consuls in our own Commission. Nor have we, at present, exactly a Tribonian to preside over and share in its labours.

If we wish to arrive at a practical and available result, at least during the lives of the present generation, the Commission must be also strengthened by the addition of a competent working staff adequate to the importance of the exigency. By grudging a little more money we may lose the benefit of what we have expended.

As the Commissioners do not appear to have presented any common report, we cannot view their proceedings as a whole. But as several of the Commissioners have from time to time given some account of their labours individually, we may briefly refer to some part of them. Some of these are of importance and of a comprehensive nature, although as communications from individual members of a Commission they cannot be regarded as thoroughly official. We are glad to perceive that the want of a method of classification, to which we have already alluded, is felt by the Commissioners. Both Mr. Coode and Mr. Rogers have suggested arrangements of statutes. Mr. Coode proposes a systematic one, exhaustive of all the possible matter of the Statute as well as of the Common Law; and Mr. Rogers proposes the following arrangement:—1. Crown. 2. Parliament. 3. Finance. 4. Public Economy. 5. Rights of Private Persons. 6. Administration of Civil Justice. 7. Criminal Law and the Administration of Criminal Justice. 8. Religion.

The following result, although proximate only, is deserving of attention, as showing that our Statutes are by no means so unmanageable as many suppose.

The following list has been issued by Messrs. Rogers and Anstey, and in the second Report is corrected to the close of the Session 16 & 17 Victoria:—

Public General Acts	-	-	-	16,579
Local and Personal Acts	-	-	-	9,285
Private Acts	-	-	-	14,268
Total	-	-	-	<u>40,132</u>

Of the Public General Acts, they find

- 2,726 Acts repealed. .
- 2,667 virtually repealed.
- 436 obsolete.
- 4,310 expired, or virtually expired.
- 480 relate exclusively to Scotland.
- 625 relate exclusively to Ireland.
- 403 relate exclusively to the Colonies.
- 2,473 of a merely local or personal application.

Total - 14,070. Deducting these from the Public General Acts
as above 16,579
14,070 Private Acts.

There remain in force 2,509 Public General Statutes relating to England exclusively; to Great Britain or to the United Kingdom.

This list, we believe, has undergone revision by Mr. Brickdale.

Mr. Coode, of whose systematic labours we desire to speak very highly, has been going through the Statutes exhaustively,—that is, beginning with those last enacted and working back: a process not only in strict conformity with the maxims of Common Law, but also of itself a kind of consolidation, and the more useful because it begins with enactments which, as being the latest, are of necessity part of the law of the land. Mr. Coode has for this purpose framed a register. The *first* column, headed “Statute,” contains the reign, chapter, and section; the *second*, headed “§§,” contains the number of sections in each Act; the *third* is headed “Subjects;” the next column, headed “Duration,” shows what has expired, what is executed of itself, and what is perpetual; the *fifth* and *sixth* columns, headed “Amends” and “Is amended by,” are important, reciprocally corresponding with each other. The *seventh* and *eighth* columns are, “Repeals” and “Is repealed by,” and are also material. Thus in the 19 vols. of Statutes from A. D. 1800 to 1852 Mr. Coode has struck out 7000 pages, and above 20,000 clauses. This work is valuable and ought, as Mr.

Coode suggests, to be published, which would, he assures us, cost only 720*l*. And the entire work might, he adds, be accomplished, with the aid of three clerks, in two years.

Mr. Coode has a somewhat higher opinion of the perfection of our law than we can entertain. He says, speaking of our invincible habit of providing law only on the occasion and for the occasion:—"Perhaps the juster view is, that it has been the means of forming, step by step, and with the constant test of practical experience, the most various, flexible, adaptable, and beneficial system of laws that has ever been developed in the world." Our quarrel is not with the result, but with the means by which it has been arrived at; for no one will deny that law may be as systematically and naturally arranged as any subject. Mr. Coode objects, however, that it wants "logical completeness." He has prepared a digest of the Poor Laws, which are, he thinks, compressible into one-twentieth of their present mass. He thus defines Consolidation:—"It consists mainly in the replacement in an improved expression, form, and order, in one synchronous enactment, of an indefinite series of distinct pre-existing laws."—"It should imply an equivalent repeal of law." Digests of the law of "distress for rent," "insurance," "the law of masters and servants," are among the fruits of the Commission.¹ The following is Mr. Ker's own statement of the plan he proposes:—

"I think the course most feasible and most practically conducive to the desired result of an improved state of the Statute Law, is the gradual consolidation, or, as I would rather call it, the re-writing of the Statute Law, combining, of course, with such consolidation or re-writing, all such improvements of the law as can be suggested; in short, continuing a process which has for a long period been applied to isolated subjects and in a desultory way, always, however, with the most marked advantage; but more rapidly, more carefully, and in a more uniform manner, and with more particular regard to the clear abrogation of all the previous Statute Law on the same subject. As fast as this process is performed with reference to any branch of the law which is the

¹ We hope to see these useful papers printed for the benefit of the public, as Mr. Ker suggests.

subject of a group of statutes; the two other processes, mentioned by your Lordship's memorandum, will have been effectually performed also,—that is, a digest will have been actually or virtually made, and in the course of framing the Act used and become unnecessary, and all the uncertainties which could be noticed on a revision, will have been cleared up.”

This plan, as Mr. Ker observes, mainly resembles that proposed by Lord Bacon. On the whole we consider it the best and most feasible of any yet proposed. Mr. Ker gives us no idea as to the time it will occupy, but we are convinced that, unless the Commission is materially strengthened, posterity alone will reap the benefit of the work. The result to be expected from the proposed plan is thus stated by Mr. Ker:—

“In conclusion, I beg to state, that if what I propose is adopted, the result, when the task is completed, will be that the whole of the existing statutes will be consolidated in separate Acts, each containing one head or subject; all Acts imperfect as to expression or otherwise will be revised and re-enacted, the Statute Book will be cleared of all obsolete Acts, all doubts as to whether any Act is or is not in force will be removed, and a body of materials will be provided for any future digest or code. Thus all the practical benefits originally contemplated by your Lordship would, as I have previously observed, be in effect attained, and the parties engaged in this task would also have been usefully employed in preparing and settling Bills, reporting on Bills not settled by them, and generally in superintending and influencing as much as possible the whole formal part of legislation with a view to uniformity, conciseness, completeness, and distinctness.”¹

The Second Report, for which we have delayed our notice of the first, is not likely to allay the feeling of public disappointment, in the result of the labours of the Commission as a whole, excited by the First Report. Individual members of that Commission have indeed, by their separate labours, arrived at some useful and remarkable results. But these, although valuable to the Profession, are yet, with some exceptions, not of a nature materially to further the plan now

¹ See p. 15., Second Report.

tardily developed in the Second Report. This report, like the first, consists merely of a letter from Mr. Ker to the Lord Chancellor. Its principal object being, we are told, to give some explanations as to Mr. Ker's "own contribution to the former report." It bears on its face an amusing expression of injured innocence, and its tone is somewhat vituperative.

The public are neither so ignorant nor so extravagant in their demands as Mr. Ker would have us believe. They had a right to expect some better proof of energy than the reports supply, from one to whom the "employment" is *not* "novel," who had been employed in the same work in the similar Commission of 1835. Eighteen or nineteen years' meditation the public thought might (though the subject be abstruse) have sufficed to have matured, ere now, some plan worthy of adoption.

Mr. Ker censures the public for complaining of the disgraceful condition of the *only* authoritative edition of the Statutes, which he defends as an historical collection.

This defence is quite beside the mark, and is unworthy the importance of the subject. For no one knows better than Mr. Ker, that even in an historical point of view, except as regards obsolete and executed matter, our Statute Book cannot be defended. We must, of course, have an historical record of our laws; but is it no reproach that we have no other? Why are the public to be thrown back upon a mere historical collection of Statutes any more than upon the journals of the Houses of Parliament? But we must proceed to notice one or two points relating to the proposed plan. We agree with Mr. Ker that it would be, if not mischievous, at least highly undesirable, to pass a declaratory Statute as to expired and defunct Acts.

The draftsmen must, as Mr. Ker suggests, have power to introduce amendments (to be pointed out as such) into the consolidated Statutes. And hereafter, whenever any alteration in a Statute has become necessary or advisable that a new edition of that Statute should be issued, and the first repealed by the Legislature. This appears to us to be the only way of keeping our promised Code of Statutes entire. "The law must be in such a form that it may be altered by isolated

Bills in any particular, and by Bills which may be themselves discussed, altered, partially abandoned in their progress through the House, &c.”¹

We are glad to observe that the vain repetitions and tautology, the “mortifera facundia,” of our Statutes, to which we have before adverted, is likely to be for ever swept away from our Statute Book as re-consolidated. Would that it might at the same time disappear from our deeds and legal instruments. We highly approve of the valuable suggestion that, with every Bill its framers should present a report explanatory² of its objects, and of the circumstances which render its introduction necessary or advisable, in place of the present long and often useless recitals. A very bad use has been made of recitals, which have in some instances of late been construed so as to control, qualify, or even to subvert, the plain literal meaning of the Statutes: this evil we hope to see remedied. Mr. Ker, we observe, considers the question of a general digest of the whole law, Statute and Common, as not within the sphere of the present Commission; this point requires further consideration.

With all due respect for the skill and powers of the members of the late Commission, it is open to the objection, especially as then constituted, that professional men whose attention is confined to one pursuit are liable, whether from the peculiar construction of their minds, or from educational bias, to confine their attention, too closely and too exclusively, to the matter immediately before them, to the exclusion of what would, in another science, be called “disturbing influences.” This, to our mind, forms also a strong reason for extending and enlarging the Commission, for an infusion of more eminent men, of men of experience in the public service, and in the administration of the laws proposed to be dealt with by the Commission.

We trust that the matter will not be suffered to rest in its present stage. A brilliant career, we are persuaded, is before our present Lord Chancellor if he will only pursue it.

A Chancellor now-a-days cannot, indeed, like Hadrian, who

¹ Second Report, p. 10.

² Ibid. p. 13.

was Chancellor (Quæstor) under Trajan, aspire to the imperial purple, but he can, like that eminent Roman lawyer, bear such a part in compiling a Digest of the laws of his country as shall make his countrymen grateful and his name illustrious. Let his Lordship try with Hadrian the "*sortes virgilianæ*," and we are confident that at all events a very important part of the same fortune may yet be his Lordship's. "*Primam qui legibus urbem Fundabit.*"¹ But above all, do not let us succumb to that terrible "*vis inertię*," which ever, by creating or suggesting ideal or imaginary difficulties and dangers, most of all hinders the progress of all real amendment.

The labours of the Commissioners have already opened out enough to show how goodly and promising a prospect is before us; to prove what might, with a more comprehensive Commission, backed by an efficient working staff, be not less readily accomplished now than in the days of the Roman decemvirs, of Hadrian, Theodosius, or Justinian.

ART. VI.—THE RECENT REFORMS OF THE COURT OF CHANCERY AND THEIR RESULTS.

It seems at one time to have been considered that the practice (for it is only by courtesy that we can call it procedure) of the Court of Chancery was the result of the labours of a series of learned sages, which during the golden age of Lords Redesdale and Eldon had attained such a degree of aptitude for its ends, such perfection both in its details and as a whole, that it would have been rash, if not sacrilegious, to disturb it.

Such being the feeling, at any rate, of the practitioners (with few exceptions), we can scarcely feel surprised when Sir Samuel Romilly's Act (affording a summary relief in charity cases) came into operation, that it was regarded as a dangerous innovation, and likely to create confusion in a

¹ Virg. *Æn.* lib. 6. l. 809.

system already perfect and symmetrical; nor perhaps ought we to feel greatly astonished at Lord Redesdale in the House of Lords making the following remarks upon that Act, faithfully embodying the conservative feelings of Lord Eldon and himself:—"I conceive," said his Lordship, "that the intention of this Act, however loosely it may be worded, was simply this—to substitute a summary proceeding, instead of a *more regular* proceeding. I have always considered that it was a wise saying, that the furthest way about is often the nearest way home; and I believe that these summary proceedings will be found to be not always the nearest way home, or at least not the best way home. I have a *fixed and rooted objection to any rash alterations of established laws*, because I am thoroughly persuaded that, generally speaking, such alterations lead to mischief. In the first place, they are precipitately undertaken, and loosely expressed; and that which the *wisdom of ages* has contrived to have clearly described, is confused by the words of an Act of Parliament, often extremely difficult to interpret."¹

When the attempt of so eminent a man as Sir Samuel Romilly to introduce a more summary mode of procedure into the Court of Chancery was characterised in such terms, we ought not again perhaps to feel surprised that its operations were confined within the smallest possible limits—that it was, in fact, almost repealed by judicial decisions, or, as Lord Eldon rather naïvely expresses himself,—“I think we have *now got to this restriction* that the Act is only to apply to simple cases.”²

Fortunately for the country, there were in the House of Commons such men as Michael Angelo Taylor, John Williams, and Henry Brougham, who took a more just view of our Chancery practice, who year after year called the attention of the House and country to the misery brought upon the suitors in the Court of Chancery by its ruinous expenses and almost interminable delays.

After many defeats their perseverance was at length, in a certain sense, rewarded. A Commission was issued on the

¹ 1 Bligh, N. S. p. 48. and see p. 74.

² Ib. p. 88.

26th of April in the fifth year of the reign of George IV., directed to the Commissioners therein named, to make a diligent inquiry "whether any and what alterations can be made in the practice established in the Court of Chancery, or in the several offices in that Court, either as a Court of Law or Equity, in causes, suits, and other matters in which that Court has, or the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal have jurisdiction, from the commencement of the proceedings to the termination thereof, whereby the expenses attending such proceedings, and the time during which they depend in Court, may be abridged usefully and beneficially to the suitors of the Court, and also whether any and what part of the business now subject to the jurisdiction aforesaid, can usefully and beneficially be withdrawn from the same, and committed to the jurisdiction of any and what other courts or tribunals."

The Commissioners named were Lord Eldon, Lord Redesdale, Lord Gifford, M.R., Sir John Leach, V.C.E., Sir Charles Wetherell (then Solicitor-General), S. C. Cox, and William Courtenay, Masters in Chancery; Anthony Hart, K.C., Stephen Lushington, D.C.L., and R. P. Smith; J. Littledale, J. H. Merivale, N. C. Tindal, and J. Beames, Barristers-at-law.

The persons who gave evidence before the Commission were either barristers or solicitors—or officials of the Court, such as Masters in Chancery, Masters' Clerks, Examiners, Clerks in Court, Registrars, various Secretaries and Commissioners of Bankrupts.

With few honourable exceptions (Mr. Bickersteth, afterwards Lord Langdale, being conspicuous among them), the parties who gave evidence seem to have participated in the views entertained by the Lord Chancellor and Lord Redesdale,—viz., that the practice of the Court was the result "*of the wisdom of ages*," and, suggesting trifling alterations, on the whole joined in commending the practice in terms most acceptable to the heads of the Commission. The Report was such as might have been expected from persons actuated by a bigoted adherence to established forms, backed up by

the evidence of those who had a deeper interest in the maintenance of abuses, profitable only to themselves. The Commissioners and their Report justly merited the indignant reproaches of Williams and Brougham in the House of Commons, and the caustic raillery of Bentham in his writings. "It is a maxim," says Bentham, "with a certain class of Reformists, not to give existence or support to any plan of Reform, without the consent and guidance of those to whose particular and sinister interest it is in the strongest degree adverse; not to do away or diminish any evil, but by the consent and under the guidance of those by whom, for their own advantage, it has been created and preserved."¹

One great reason of the delays in the Court of Chancery, and consequently of expense to the suitor, was the multiplicity of duties thrown upon the Lord Chancellor, who, in addition to the judicial labours of his own Court, had also important political functions to fulfil. And much of his time was occupied in hearing appeals in the House of Lords, rendering it almost impossible for him to attend to the business of his own Court, so as to take both original matters and appeals from the Master of the Rolls, then the only other Chancery Judge. In consequence, many years elapsed, after a Bill was filed before the cause came on to a hearing, many years after a hearing before an appeal could be heard, and, during Lord Eldon's time, years sometimes elapsed after an appeal was heard, before judgment upon it was delivered.

By various statutes, the judicial strength of the Court of Chancery was increased. First by the creation of a Vice-Chancellor of England, and then by the addition of two other Vice-Chancellors. The appeals in Bankruptcy business, which occupied so much of the time of the Lord Chancellor, were transferred to one of the Vice-Chancellors. And subsequent Chancellors (Lords Lyndhurst, Brougham, and Cottenham), notwithstanding the severe duties still thrown upon them, gave no reason to the suitors to complain of delays on their part.

Finally, a Court of Appeal was constituted, consisting

¹ Bentham, vol. ii. p. 13.

either of the Lord Chancellor and Lords Justices, or of the two Lords Justices alone, and the jurisdiction over appeals in Bankruptcy, and over matters in Lunacy, are now taken before the Lords Justices of the Court of Appeal. The consequence of these alterations has been, that the Lord Chancellor has ample time, without injury to the suitors of the Court, to preside over the House of Lords, to attend to his political duties, and, above all, to superintend and initiate those legislative labours which in other countries belong to a Minister of Justice, with whose office that of Lord High Chancellor either is already, or ought soon to be assimilated.

Another great source of delay and expense in Chancery was the verbose and technical character of the pleadings,—a most complicated practice,—the worst part of which consisted in the mode of directing references to the Master, and the mode in which business was transacted in the Masters' offices. Constant attacks were made on these abuses, which were no less constantly defended. The greatest obstacle, however, to all reform of the Court of Chancery was doubtless the fact that most of the officials of the Court derived their incomes from fees taken from the suitors at various steps in the cause; which accounts for many an absurdity found in the Books of Practice otherwise unaccountable, and which none but the staunchest admirer of Chancery Practice could attribute to "*the wisdom of ages.*"

The Legislature paved the way to further reforms, by remedying, to a great extent, this abuse, giving fixed salaries instead of fees to many of the functionaries and officers of the Court, together with compensation (of which we shall give hereafter some instances), to an amount which shows to how great an extent the suitors of the Court were preyed upon by those who ought to have helped and protected them.

We have before shown with what apprehension Lords Eldon and Redesdale regarded Sir Samuel Romilly's Act; of late years, however, the advantage of so summary a proceeding has been so much appreciated as to cause it to be resorted to most extensively.

In many other instances has a summary mode of procedure

been substituted for the ancient forms of the Court. Amongst them may be mentioned proceedings under the Trustee Acts of Lord St. Leonards, enabling the Court to deal with the trust estates, the appointment of new trustees, and the estates of persons under disabilities upon summary application. And these Acts have been, so far as they relate to trust estates, consolidated and amended by the Acts introduced by Mr. Headlam.

Again, under Lord Cottenham's Trustee Relief Act, trustees were authorised to pay money or transfer stock into Court, leaving the parties interested to apply.

Again, a very great change was introduced in Chancery Procedure by the general orders of Lord Cottenham of April, 1850. By these, in a great number of specified cases, without any formal pleadings at all, by the filing of what is called a Claim heard summarily upon affidavits, and, if necessary, on counter-affidavits, the Court was enabled at once to pronounce a decree between the parties, and, besides the specified cases, the Court was authorised in every case in which it thought it fit, to permit a claim to be filed. The extent to which this new system was at once used was shown by the number of Claims filed. The order came into operation on the 22nd May, 1850; between which time and the 12th January, 1852, 1969 Claims were filed in almost every variety of case; upon those 863 decrees or orders had been drawn up, and 245 stood in the list for a hearing. Of the remaining number by far the greatest proportion had been disposed of by compromise or otherwise. Some few had not been set down to be heard. In a small number of cases heard, the Court had felt itself unable to deal satisfactorily with the matter by way of Claim, and had left the parties to proceed by Bill.¹

We must not pass over Lord Justice Turner's Bill (3 & 4 Vict. c. 35.), which authorised parties to state facts by way of *special case*, without any further pleading for the decision of the Court.

Notwithstanding the unquestionable great improvements

¹ Chancery Commissioners' Report, 1852, pp. 12, 13.

which had taken place in the practice of the Courts of Chancery, it was still in many respects lamentably deficient in what ought to be the object of every system of procedure; the pleadings were still notorious for multiplicity and verbosity; above all, the delays in the Master's offices, although they were most of them presided over by able and zealous men, showed that a new machinery was wanting.

Under these circumstances, the profession at large being in favour of reform to a certain extent, and the public loudly demanding it, a new Chancery Commission was issued, composed, fortunately, of very different materials to that of which Lord Eldon was the head. The names of the present Master of the Rolls, the Lord Justice Turner, the present Solicitor-General, the late Vice-Chancellor Parker, Vice-Chancellor Sir W. Page Wood, and Mr. W. Milbourne James, to which were afterwards added those of two distinguished laymen, Sir James Graham and Mr. Henley, were sufficient guarantees that something was intended to be done.

The Report of the Chancery Commission formed the basis for the legislation on Chancery Reform in the year 1852, and great credit is due to Lord St. Leonard's, who, as Lord Chancellor, in deference, it is presumed, to the recommendation of the Commissioners, and the wishes of the country, carried out with unflinching vigour measures, some of which, from his evidence before the Commission, appear hardly to have met with his approval.

The statutes passed in the Session of 1852 (in pursuance of which numerous orders were afterwards issued) were the Act for the Improvement of the Jurisdiction in Equity (15 & 16 Vict. c. 86.); and the Master in Chancery's Abolition Act (15 & 16 Vict. c. 80.), and the Suitors in Chancery Relief Act (15 & 16 Vict. c. 87.). These it is proposed now to examine with some particularity.

In the first place, the *printing* of Bills and Claims, instead of having them engrossed, according to the old practice, on parchment, seems to have answered in all respects the expectations of those who suggested the innovation (15 & 16 Vict. c. 86. s. 1.); and it is, therefore, to be hoped that parties

should, at any rate, have the option of printing other proceedings, if it should seem advisable for them so to do.

The service of the printed Bill or Claim, instead of the writs of subpoena and summons, now abolished (sects. 2, 3, 4, 5.), is also a great improvement, inasmuch as a defendant, without going to the expense of getting an office copy of the Bill, for which large fees were payable, may at once see what is the object of the suit, and what is demanded of him. This, in many cases, is a matter of no small importance, as the fees for the office copy of a lengthy Bill might greatly inconvenience a poor man, or even drive him to an unfair compromise.

It is to be regretted that it is still necessary to send a little missive to Peers and certain other privileged persons, not only because additional fees are thereby payable, but because, in these days, there appears no valid reason why every subject should not, in every respect, be, in the eye of the law, upon a perfect equality.

The form of Bills in Chancery has been much simplified, as it consists now of a simple statement of facts (each paragraph for convenience sake being numbered consecutively), with a prayer for specific and general relief, omitting what, in many cases, are quite unnecessary, the interrogatories, which, under the old practice, formed part of every Bill (sect. 10.). These interrogatories were founded upon the statements in the Bill, and were a series of questions framed upon the principle that the defendant might possibly be a dishonest defendant, disposed to answer evasively, and, therefore, suggesting modifications of the statements.

It is clear that such interrogatories would be useless, when the defendant to whom they were addressed could either give no information on the subject, when the whole suit could either be disposed of hostilely in a summary mode, by plea or demurrer, or amicably by a compromise, or under the new practice by a motion for a decree in the mode hereafter mentioned.

According to the new practice, interrogatories founded upon the statements in the Bill are only, if thought necessary, filed after the Bill (sect. 12.).

A great saving of expense has in numerous cases been effected by the power given to the plaintiffs to move for a *decree or decretal order* upon affidavits on either side (an answer, if one has been put in, being used as an affidavit), without going through the numerous formalities of an old Chancery suit (sect. 15.). This enactment has been of the greatest use, and has enabled the Court to dispose of many cases in a very quick and summary manner, especially where little evidence is required, or where evidence by affidavit would probably be as satisfactory as that of another character, or where the opinion of the Court is merely wanted in the construction of an instrument, or a partial or declaratory decree is sought under the powers given to the Court, which will be shortly mentioned.

It has to a great extent superseded both Claims and Special cases, inasmuch as proceeding by motion for a decree on a Bill filed is quite as summary and inexpensive, and it possesses various advantages not possessed either by Claims or special cases. A Bill may be filed in all cases where a case for equitable relief is made out, whereas in the case of a Claim special leave must be obtained in those cases not provided for by the orders. Again, if after a Claim has been filed the case turn out to be of rather a complicated character, a Bill must after all be filed, whereas on a motion made for a decree on affidavits; even if it turn out that the matter cannot be determined on motion, the Court has full power at its discretion to give directions as to the further prosecution of the suit, of which the Bill itself would be the groundwork (sect. 16.).

Again, the option given to a defendant in certain cases to examine a plaintiff by interrogatories instead of filing a Cross-Bill, and the power given to the Court, on the application of the defendant, to require the production of documents by the plaintiff (sect. 20.), often effects no inconsiderable saving of expense, since without the formality of a Bill a defendant can by filing interrogatories get admissions of facts, or, without interrogatories, by application to the Court, obtain the production of documents necessary to his defence; while in complicated cases, as, for instance, where the defendant seeks

to set aside, on the ground of fraud, an instrument which the plaintiff in the original Bill seeks to enforce, the option of the defendant to the original Bill would be more advantageously exercised by filing a Cross-Bill according to the old practice.

A great and important improvement has been made in the old mode of taking answers, disclaimers, and examinations within the jurisdiction (Commissions for that purpose being now abolished), and they are now put in with no other formality than what is required in the case of affidavits (sect. 21.). An equally great improvement has taken place with regard to the mode of taking pleas, answers, disclaimers, &c., out of the jurisdiction (sect. 22.).

We now come to one of the most important changes introduced into the Chancery Procedure, viz. in the mode of taking *Evidence*. Under the old practice evidence was taken by written interrogatories, upon which the witnesses were examined, in London before an Official Examiner, in the country before a specially appointed Examiner. The examination took place in *private*, none of the parties or their solicitors being present, the witnesses being liable to a species of cross-examination, which has, however, been justly characterised by a great lawyer as "a mere farce," inasmuch as the examination in chief was kept secret until its publication, at which time only, the parties could get copies of the evidence. One new feature in the present practice is, that the parties may exercise an option whether the evidence is to be taken *orally* or by *affidavit*. This is a great improvement, as in many cases the evidence to be elicited by affidavit may be quite as satisfactory as evidence of another character, especially as parties making affidavits are now liable to *oral* cross-examination.

In the event of the parties proceeding to examine their witnesses *orally* under the new practice, this takes place before one of the Examiners of the Court (two in number), or before an Examiner specially appointed by the Court, and the examination, cross-examination, and re-examination take place in the *presence of the* parties, their counsel, solicitors or agents (sect. 31.). Now, although the principle of taking

evidence orally where the parties think it necessary is clearly right, nevertheless the new mode of taking such evidence is both inefficient and expensive. Inefficient, because the evidence being taken down by the Examiner in writing, the Judge before whom the cause is heard cannot, when the evidence is conflicting, form any opinion as to the weight to be attributed to the different witnesses from their demeanour and bearing—in many cases a most important consideration; expensive, because, from the small number of Official Examiners, there is great delay in taking the evidence, and both before them and the Special Examiners the examinations run to enormous length, often upon matters barely relevant, often entirely irrelevant, but which they are obliged to take down, when, in many cases, by a few questions before, or by the Judge, the whole pith of the matter might be at once arrived at. If the new system of oral examination is to be worked effectually, the number of Official Examiners must be greatly increased, at a proportional increase to the cost of the country; considering this and the great cost of Special Examiners to the suitors, it is questionable whether it would not be better, even in an economical point of view, to increase the number of the Judges, so that the evidence might, in all cases, when necessary, be taken before them orally, abolishing the office of Examiner; for in every point of view, except that of inconvenience to the parties to be examined, and the expense thereby incurred, an examination before the Judge who hears the case would be far preferable to its being taken by another person. “The best course,” observe the Chancery Commissioners, “would doubtless be to examine and cross-examine the witnesses in open Court before the tribunal which has to judge according to the evidence; but, practically, it would be impossible to carry on the business of the Court of Equity, if all the evidence were taken *vivâ voce* before the Judge; and the inconvenience to persons liable to be called to London, and kept until the cause or matter was called on would be intolerable; while the expense to the parties would make justice too dear” (Ch. Com. Rep., 21.). Assuming the reasoning of the Chancery Commissioners to be correct, we cannot avoid coming to

the conclusion that, in order to maintain the centralisation of our Courts of Equity, we sacrifice what in many cases is admitted to be so important to the attainment of truth—the examination of witnesses before the Court itself; at the same time we cannot refrain from observing, that the most important objection to oral examination of witnesses before the Judge arising from inconvenience to the parties, does not apply to that portion of the Courts either in, or within a moderate, distance of London, including nearly one-fourth of the population of England; nor does there appear any reason, even when parties might be called to London, why they should be detained long, as causes, where evidence was to be taken orally, might be made to stand at the head of the paper on particular days. With regard to the impossibility of conducting the business of the Court, that of course depends on the number of the Judges, and, as before observed, it might be more economical to increase their number.

It may be here remarked, that it is much to be regretted that the Equity Court of the County Palatine of Lancaster is not made more efficient; if it were so, a very considerable portion of the business of the Courts might be transacted there, and thereby the mode of taking evidence, which the Commissioners clearly thought the best, might, with respect to another large portion of our population, be rendered feasible. The salary, however, of the Chancellor of the Duchy of Lancaster is payable in respect of political rather than judicial functions; while his substitute, the Vice-Chancellor, practises within the Bar at London, and cannot therefore be an efficient Judge in the County Palatine; were the office and income of the Chancellor and Vice-Chancellor of the County Palatine thrown together, and residence and continued sittings required, an important step would be made to get rid of the acknowledged evils of centralisation; and no person would hold the office with greater credit to himself or utility to the country than the present Vice-Chancellor of the County Palatine—one of the most active members of the late Chancery Commission. It seems, however, to be a matter of questionable propriety, sanctioned though it be, like many other abuses, by prescription, that a person should

practice at the Bar, and probably be employed, and take fees from persons one day as Counsel, when the next he might have to adjudicate between them and others as Judge.

A Judge should not be in a false position—he should be above the suspicions of the most suspicious.

To return to the subject of evidence, one of the most useful provisions, which has in effect greatly improved the character of evidence by affidavit, is the power to subject the persons making them to *oral* cross-examination (sect. 38.). Equally useful is the power given to the Court to require before itself the production and oral examination of any witness or party to a cause (sect. 39.); and the power given to the parties to examine a witness orally, on any claim, motion, petition, or other proceeding, as at the hearing of the cause (sect. 40.).

Another very important improvement is with regard to *parties* to suits. It was formerly a fundamental rule of Equity practice that all persons interested in the subject matter of the suit should at once be made parties to it. The object of this rule was to do, as it was thought, complete justice, by deciding the rights of all persons, so as to make the form of the order of the Court perfectly safe to those who were compelled to obey it, and to prevent future litigation (Mitf. Plead. 133.). This was the cause of much complication, delay, and expense, as many of the parties might appear by separate solicitors, put in separate answers, and all proceedings would ordinarily be obliged to be taken against them separately. Moreover, on the decease of any of the parties to the cause, or on the change or transmission of their respective interests (events which very frequently happened when, under the old practice, the delays were great, and the parties numerous), the suit became either defective or abated, and it was necessary to take various proceedings to put the cause again in progress. The various rules of section 42, by which the number of necessary parties to a suit is greatly diminished, has very greatly decreased the costs of a suit. And by the 7th rule of that section, the interest of all persons not made parties is sufficiently protected from any improper conduct or collusion by the power given to the

Court to require any *other person* to be made a *party* to the cause, and to give the *conduct* of it to such persons as it may deem proper. Moreover, by the 8th rule, all persons who, according to the old practice, would be necessary parties, must be served with notice of the decree, and they may, by order of course, attend the proceedings under the decree, and may apply to add to the decree.

A new and very summary mode of obtaining a decree to administer *personal estate*, by proceedings commenced by a mere *summons* before the Judge at Chambers, is, by the 45th section, conferred on creditors, legatees, or next of kin. Under the 47th section, a creditor interested under the will of a deceased person may obtain a similar decree on a summons for the administration of the *real estate*, where the *whole* of such real estate is *vested in trustees* with *power to sell* and *give receipts* for the rents and produce thereof. It is to be regretted that the power of proceeding in the administration of real estate should be of so limited a character; and it may here be suggested that, as all real estates are now assets for payment of debts, they should all, whether freehold or copyhold, in the same manner as chattels real, vest primarily in executors or administrators for payment of debts, and that a mere summons should in all cases be sufficient to obtain an administration decree.

The power given to the Court to direct the sale of mortgaged property instead of foreclosure (sect. 48.); to proceed with suits, notwithstanding the misjoinder of plaintiffs (sect. 49.); to direct accounts to be taken in a more businesslike manner (sect. 54.); to order real estates to be sold, if necessary, before the hearing (sect. 55.); to lay an abstract before conveyancing counsel (sect. 56.); to make an allowance to parties interested out of the income of real or personal property, or out of personal property the subject of a suit (sect. 57.); to rectify mistakes in practice and proceedings (sect. 60.); and the assimilation of the practice as to injunctions to stay proceedings at law, to the practice, as to special injunctions (sect. 58.), — may be mentioned as having already been of great utility, and of having supplied acknowledged defects.

Under the old practice, there existed a general rule which

prevented the Court from executing a trust *partially*, or from making a merely *declaratory* decree. For instance, if a question arose as to the construction of a testator's will, the Court would not consider the question except in a suit for administering the estate, and after taking the accounts, and ascertaining the property. The evils caused by such a rule are obvious; it had a tendency to load the record with numerous parties—a fruitful source of expense—in addition to the expense and delay of taking unnecessary accounts. The 50th and 51st sections, however, enable the Court to execute trusts *partially* and to make *declaratory decrees*.

Bills of Revivor and Supplement (as is well known) had long been the source of great expense and delay in Chancery. This has been in some degree remedied by the 52nd section, by which a suit may be revived or the usual supplemental decree obtained, without a Bill being filed, by an order of course to be served on the parties who would have been parties to such Bills. This section is, however, by no means so comprehensive as it ought to have been, and Bills may still be filed in some cases for the purpose of reviving a suit, which a little more care in framing the section would have rendered unnecessary.

The technical rule of the Court, that nothing which had occurred *after* the institution of the suit could be introduced into a Bill *by way of amendment*, rendered a new Bill, a new appearance, and a new answer necessary, in order to bring the supplemental matter before the Court. The reason given for the rule (as good probably as *could* be found for much of the Chancery practice) was, that the introduction of matters of posterior date would render the record incongruous (2. Atk. 136.). The object of the 53rd section appears to have been to render such Bills unnecessary, as it enables a plaintiff to put in issue, *by way of amendment*, facts occurring *after* the institution of the suit. Unfortunately, however, it has been held that this section does not apply *after* decree, and does not apply *before* decree for the purpose of bringing *new parties* before the Court, but only for bringing forward *new facts* between the same parties; so that in reality the object of

the section seems to be scarcely attained, and in many cases Supplemental Bills are still necessary.

Another great source of expense was the rule by which, when a question of law arose, often turning on the construction of an Act of Parliament, or a deed or will, either party, if he desired it, was entitled to the opinion of a Court of Law; and a special case was therefore in general directed for the opinion of such Court, before which the whole matter was discussed. If the opinion was not satisfactory to the Equity Judge, he sometimes directed a second, and even a third opinion to be sent to another Court; and, perhaps ultimately refusing to adopt any of them, decided according to his own view of the case. Such proceedings may have been satisfactory to the Court, especially to a timid or indolent Judge, willing to shift all responsibility from himself; but rather expensive to the unfortunate suitor, tossed like a shuttlecock from Court to Court, and from Judge to Judge, in a manner which was often as wantonly unnecessary as it was disgracefully oppressive. By the 61st section no cases are to be sent for the opinion of a Court of Law, and by the 62nd section power is given to the Court to determine the legal title or right of parties, without requiring them to establish it at law. These sections will save much expense and will enable Courts of Equity to act independently of Courts of Law.

Proceeding now to the consideration of 15 & 16 Vict. c. 80., by which a very great alteration has been effected in the constitution and practice of the Court of Chancery, viz., the abolition of the office of Masters in Ordinary in Chancery, in whose offices was matured and practised a system of delay and vexation, which the Chancery Commissioners rightly judged was incurable while the old machinery remained. After giving an instance of the working of the system, they thus observe: —“ *It had its origin at a time when the Masters and the Clerks were paid by fees.* Every warrant, every copy, every report, indeed every proceeding carried its fee, small perhaps in individual amount, but the multiplication of which pressed heavily on the suitor, and yielded large emoluments to the officers. This method of remuneration

rating the Masters and their chief Clerks by fees has been put an end to by the Chancery Regulation Act; but the system still remains, fees are still paid as heretofore, though the amount is carried to the fee fund, and *the effects of the system still remains in the mode of procedure,*" of which we have given an example." (Ch. Com. Rep. 30.).

The duties which were formerly performed in the Masters' offices are now performed by the Judges at chambers, and their chief clerks acting under their control and direction, and many proceedings are now taken at chambers, without the intervention of the Counsel, which formerly were only heard in the Court.

It is believed that matters are disposed of much more expeditiously, as well as less expensively, in chambers, than they formerly were in the Masters' offices; *how* matters are done there it is more difficult to say; it is, however, by no means improbable that, if the Judge himself does not overlook and control the operations of his chief clerk (and with the large amount of work thrown upon the Judges in Court it is difficult to see how they can), it may be predicted with tolerable certainty that evils, if not precisely of the same character as those which existed in the Masters' offices, yet equally mischievous, will sooner or later spring up. It may be here observed, that the practice at chambers seems scarcely to carry out either the recommendation of the Commissioners or the intention of Parliament, of each Judge in effect working out his own decrees.

The power given to the Judges at chambers, in certain cases to take and act upon the opinion of Conveyancing Counsel (sect. 40.), to be nominated by the Lord Chancellor (sect. 41.), and for the Court to obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons (sect. 42.), and to a retiring Lord Chancellor to deliver written judgments after his resignation (sect. 60.) are all useful enactments; but it seems to have been hardly wise to limit the power of a retiring Lord Chancellor to deliver his judgments within six weeks of his resignation.

The object of 15 & 16 Vict. c. 87. (The Suitors in Chancery Relief Act), is principally to give various functionaries fixed

salaries, instead of allowing them to retain various fees and emoluments for the business done and transacted by them in or by virtue of their respective offices. A most beneficial change; for, as we have before shown, the most fruitful origin of abuses, as well as the greatest obstacle to every improvement in the practice of the Court, has been the payment of the officers of the Courts by means of fees. A return lately made to Parliament, on the motion of Mr. Walpole, will illustrate the shameful manner in which, by means of fees, inferior functionaries of the Court were enabled, for duties which might be performed almost by the meanest capacity, to extort from the unfortunate suitors' incomes equal to what is considered a sufficient remuneration to the highest judicial talent.

It is as follows:—

“Return of the total Sum due or paid for Salaries and Office Expenses under the Act 5 & 6 Vict. c. 103. since the Passing of the said Act; and also of the total Sum paid for Compensation for Loss of Office and Profits of Officers, under the same Act, since the Passing thereof up to the 25th day of November, 1853 :—

	£	s.	d.
Total sum paid for salaries and office expenses under the above Act, in the Court of Chancery, since the passing of the Act up to the 25th day of November, 1853 ¹	-	-	- 351,639 4 6
Total sum paid for compensation for loss of offices and profits to officers under the same Act, since the passing thereof up to the 25th day of November, 1853	-	-	- 437,317 19 1
	£788,957	3	7

“Return of the total Sums paid to each of the Sworn Clerks appointed Taxing Masters, for Salary and Compensation under

¹ This sum does not include the amount of expenses from the 25th November, 1852, to 25th November, 1853, as since that time they are not distinguishable from the expenses of the other officers of the Court; but it includes a sum of 68,358*l.* 14*s.* 3*d.* paid to stationers for copying, &c., up to the 25th day of November, 1852.

the Act, since the Passing thereof up to the 25th day of November, 1853:—

	Salary.			Compensation.			Total.		
	£	s.	d.	£	s.	d.	£	s.	d.
To George Gatty - -	10,027	3	5	58,784	3	1	68,811	6	6
To Henry Ramsay Baines	22,027	3	5	57,316	14	6	79,343	17	11
To John Wainewright -	22,027	3	5	44,057	10	6	66,084	13	11
To Richard Mills - -	22,027	3	5	50,449	4	2	72,476	7	7
These sums are included -	76,108	13	8	210,607	12	3	286,716	5	11

“Return of the Annual Amount of Compensation awarded to each of the said *Taxing Masters* under the said Act, in the event of their Ceasing to hold the said Office; and of the Annual Sums to be paid to the Personal Representatives of each of them, as Compensation after their Deaths and for what number of Years after their Deaths such Payments to their Personal Representatives are to continue; and out of what Funds, and by whom, such Payments for Salary and Compensation are now made and to be made:—

Names.	Annual Amount of Compensation in the Event of their Ceasing to hold Office as Taxing Masters.			Annual Sum to be paid to their Personal Representatives after their Deaths.			[For what Number of Years after Death.	Out of what Fund such Payments for Salaries and Com-pensations are now made and to be made.
	£	s.	d.	£	s.	d.		
Baines, Henry Ramsay	5,403	2	9	2,701	11	5	7	Out of the Suitors' Fee Fund, and by the Governor and Company of the Bank of England.
Gatty, George - -	5,424	14	4	2,712	7	2	7	
Mills, Richard - -	4,935	9	7	2,467	14	10	7	
Wainewright, John -	4,500	5	1	2,250	2	7	7	

Another flagrant instance of the mischief of allowing officers to be paid by fees, was the case of the Accountant-General of the Court of Chancery, in whose name all the stock belonging to the suitors stands. Previous to the Suitors in Chancery Relief Act, which gives him a salary, he received a commission on the amount of stock directed to be sold, and of the stock directed to be purchased on each particular day, although the balance either of the amount to be sold or purchased may have been trifling. For instance, if on the 1st November 26,000*l.* stock was directed to be purchased, and

25,000*l.* to be sold, the Accountant-General and the broker would each receive a brokerage or commission as though 26,000*l.* stock had been actually purchased, and 25,000*l.* actually sold, although in reality 1,000*l.* only had been purchased.

Another object of the Suitors in Chancery Relief Bill is the abolition of certain offices, the collection of the fees payable to the Court by means of stamps, and the reduction of the amount of the fees. The return before alluded to gives an interesting account of the reduction of such fees under this Act, and orders made in pursuance of it, as well as under former Acts and orders. This return gives the dates and substances of all orders of Court for the reduction of *fees* in the Court of Chancery made since the passing of the 5 & 6 Vict. c. 103., with the estimated amount per annum of such reductions, and the estimated total amount saved to the suitors thereby from the date of the said orders respectively to November, 1853.

It appears that under the order of the 22nd March, 1844, by which the charge upon copies made in the office of the Clerks of Records and Writs, was reduced from 10*d.* to 8*d.* a folio, a reduction of 46,765*l.* 7*s.* 8*d.* has been effected.

Under the order of the 15th April, 1844, by which the charge upon copies made in the office of the Examiners was reduced from 1*s.* 2*d.* to 8*d.* per folio, a reduction of 54,976*l.* 6*s.* 8*d.* has been effected.

Under the order of the 21st June, 1844, whereby the charge upon copies made in the office of the Clerks of Records and Writs, and also upon copies made in the office of Examiners, was reduced from 8*d.* to 6*d.* a folio, a reduction of 49,502*l.* 10*s.* 8*d.* has been effected.

Under the order of the 13th November, 1844, by which the charge upon copies made in the office of the Clerks of Records and Writs, and also upon copies made in the office of the Examiners, was reduced from 6*d.* to 4*d.* per folio, a reduction of 49,502*l.* 10*s.* 8*d.* has been effected.

Under the order of the 12th February, 1845, by which the per-centage on the amount of bills of costs, as taxed, which, by an order of the 26th October, 1842, was made

payable in the Taxing Master's offices, was reduced from 4*l.* to 3*l.* per cent., a saving of 40,631*l.* 5*s.* has been effected.

By an order of the 3rd March, 1847, by which the charges upon copies made in the Report Office was reduced from 9*d.* to 4*d.* per folio, a saving of 32,668*l.* 8*s.* 4*d.* has been effected.

By the order of the 23rd February, 1850, reducing the fees taken in the office of the Principal Secretary to the Lord Chancellor, a reduction of 8,703*l.* 4*s.* 4*d.* has been effected.

By the order of the 22nd March, 1851, by which fees in the offices of the Masters in Ordinary, the Taxing Master, the Registrars, the Master of Reports and Entries, the Clerk of Affidavits, the Examiners, and the Clerks of Records and Writs, were reduced and abolished, a reduction of no less than 36,700*l.* 5*s.* 8*d.* has been effected during the years 1851 and 1852 alone.

By the orders of the 22nd March, 1851, and the 25th October, 1852, by which fees were reduced and abolished in all the offices of the Court of Chancery in the year 1853, the reduction amounted to 36,672*l.* 15*s.* 9*d.* The total of these reductions have effected a saving to the suitors in the Court of Chancery of 309,355*l.* 7*s.* 1*d.*, a large sum even with reference to the costs of the Court of Chancery.

By means of the provisions of the Act, it will be observed that the salaries of the Judges and officers of the Court are to be paid out of the Consolidated Fund, and the fees are being gradually reduced. This is proceeding upon a correct principle, as the expenses of Courts for the administration of justice ought to be thrown upon the country at large, and should not be borne or paid by the suitors. It may, however, be admitted that such part of the expenses of a suit in Chancery as are occasioned by the management of property in the hands of the Court, ought, in the same way as if it were in the hands of private trustees, to be borne by the property itself or those interested in it.

On the whole, it may be said that the Chancery Reform Acts of 1852 have worked most beneficially to the suitor, and have gone far to remedy many of the evils for so many

years laid to the charge of the Court of Chancery, and entitled those who originated and those who carried them through the Houses of Parliament to the gratitude of the country. But still there remains much to be done—many great questions remain to be settled.

Commissions being composed principally of men trained in the practice of the Courts are less inclined to take broad views on matters of Jurisprudence than to support the established order of things. A Report, moreover, of a Commission must not always be taken as embodying the views of the man of the largest and most comprehensive mind,—it is too often the result of compromise; and therefore, to a certain extent, is imperfect in unity of design and execution. Again: before this last Commission, as well as before Lord Eldon's, the parties examined were those who either were practitioners in the Courts, or functionaries of different grades; persons of this class will suggest probably many wholesome reforms, but not such as will prejudicially affect their own interest, or interfere much with deeply rooted prejudices. It might have been advisable to have called another class of persons—parties most deeply interested in the inquiry—to give evidence before the Commissioners, viz. the suitors. The production of half-a-dozen bills of costs, relating to each particular class of suits, would, if carefully analysed and examined, do more to show the working of the Court than all the evidence of the Bar, the solicitors, and functionaries put together. The bill produced by Mr. Henry Lake before the Chancery Commissioners (see Appendix, p. 181.) is an example by which these remarks may be tested.

Another suggestion, it is believed would, if it were carried into effect, be of considerable benefit to the suitor and the public, and would greatly assist any future Commission, viz., that there should be a complete system of the statistics of the business performed in each department of the Court, the amount of the property, the subject-matter of the various suits as far as it could be ascertained, and the amount of the costs of conducting each suit. By this we should be able to see, not only whether the business of the Court was con-

ducted in all cases with reasonable despatch (as it certainly now is in all cases as far as the Judges are concerned), but we should be able to ascertain what are the ordinary expenses of suits of different kinds. The expense of each suit might be ascertained by requiring the bills of costs to be filed like the other proceedings, and that returns should be annually made by proper officers.

If filing each bill of costs would be too expensive, or should be otherwise objectionable, there is no reason why the amount of each bill properly verified should not be filed.

To ascertain the average expenses of suits in Chancery would be most important with reference to a question which has not been sufficiently considered, viz. whether, in many cases, the good which results from the centralization of business is not, especially where the subject-matter of litigation is small and the parties interested in it are numerous, and residing at a distance from the central Court, more than overbalanced by the great expenses and delays which might be avoided in a local Court. In all cases where it should be found that the expenses of conducting a suit in Chancery bore so great a proportion to the value of the subject-matter of litigation, as in reality to subject the unsuccessful party to a penal fine in the shape of costs, if those expenses cannot be reduced to a fair amount under the present system of centralization, jurisdiction ought to be given to local Judges, as, for instance, the Judges of the County Courts. There appears to be no reason why the property of a person on his death should not be administered in the most convenient place, viz. the place of his domicile.

Take the case of administering the property of a tradesman or small landed proprietor dying in Cornwall or Cumberland, in the Court of Chancery, might not a County Court Judge be trusted to do what in general an executor in most cases ought to do, viz. to distribute the assets among the creditors according to their priorities? The expenses occasioned by proceedings for that purpose in the Court of Chancery, even under the improved system, are greater than it is believed are necessary. Suppose, for instance (and if we knew the whole truth, it is not unfrequently the case), a person dies leaving

property, real and personal, worth 5000*l.*, and debts either 1000*l.*, more or less than that amount, if the consequence of a creditors' suit is a bill of costs to the amount of 1000*l.*, and the distribution could have been made in a local Court for 100*l.*, in the first instance creditors of the deceased, in the second his relatives, have been mulcted in the sum of 900*l.* for the benefit of metropolitan practitioners.

Many take objection to the transfer of jurisdiction to local Courts, and seem to imagine it is impossible that the business which now occupies so much of the time of the Court of Chancery, can be efficiently performed in a provincial *forum*; in fact, that justice cannot be well administered save within the sound of Bow Bells. As far as the Common Law is concerned, the County Courts have dispelled that illusion; and any person who will examine carefully the bulk of the business which comes before the Court of Chancery, must confess that a very considerable portion of it might be well disposed of by a local Judge, especially if difficulties arising either from a faulty and complicated practice or from conflicting cases, were removed by an efficient mode of procedure.

When difficulties arise in cases where the property in the hands of trustees is very small, where it would be unsafe to make any payment, and at the same time the solution of the difficulty by the obtaining of the opinion of the Court would only result in the absorption of the whole of the property, it might be advisable to give such trustees power to take the opinion of certain official counsel; and on their acting upon such opinion, they should be indemnified in the same manner as under the Charitable Trusts Act, 1853 the Trustees of Charities who obtain and act upon the advice of the Commissioners (16 & 17 Vict., c. 137, s. 16.).

With regard to the question of the *Fusion* of Law and Equity we seem to be proceeding upon a safe and efficient plan, viz. that of making each Court, whether of Law or Equity, able to do complete justice within itself, without rendering it necessary for the suitor to resort to another Court. Thus, as we have already seen, the Courts of Equity have full power to determine all *legal* questions. It might possibly be advisable to give them power in certain cases to

call to their assistance, if it should be deemed necessary, a jury, in order to enable them to determine more satisfactorily matters of *fact*.

With regard to the Courts of Common Law, the same process is going on; by the Common Law Procedure Bill 1854, it will be unnecessary for suitors in a Court of Law to resort, as heretofore, to a Court of Equity. By that Bill it is proposed to give power to the Courts of Common Law to order the production of documents for the purpose of discovery (sect. 50.), and the delivery of written interrogatories for the examination of the opposite party (sect. 51.), to order the specific delivering up of chattels (sect. 77.). It is proposed, moreover, that a defendant may plead an equitable defence (sect. 83.), and even set up such defence after judgment (sect. 84.). Power is also given to the Judges of the Courts of Common Law, upon summary application, to stay proceedings on equitable grounds (sect. 85.), and to restrain a defendant from setting up a defence which he would be restrained from setting up by a Court of Equity (sect. 86.); and power is given to the plaintiff to reply, in answer to any plea of the defendant, facts which absolutely avoid such plea on equitable grounds (sect. 87.).

Another important reform which stills remains to be carried out with reference to the Court of Chancery, is a complete revisal, simplification, and codification of its practice, so as to form it into one harmonious and well arranged system of procedure, where litigants and their advisers could find laid down, in clear and intelligible language, in what mode suits are to be conducted, and what steps are necessary to be taken in different stages of the cause. Our present Chancery practice is derived from various sources—decisions of the Court, traditions of its officers, Acts of Parliament not always clearly expressed or logically arranged, and Orders of the Court, some drawn without reference to others, some fallen into desuetude partial or entire, some partially or entirely over-ruled by an inconsistent series of decisions.

The practice, as derived from these various sources, is, as might be expected, in a most confused state. In Ireland, Lord St. Leonards, when Lord Chancellor, consolidated all the Orders—a work, no doubt (though but one step towards

a perfect Code), of considerable utility; it seems, however, difficult to imagine why we should not have one systematic Code, instead of three without system, arrangement, or unity of purpose or design, viz. that of the statutes, that of the Orders, and that of the decisions, — often jarring and conflicting with each other. A minister of justice, by whatever name he might be called, properly understanding and endeavouring to fulfil the duties of his station with honour to himself and advantage to his country, would soon find the means of attaining so desirable an end, without being urged on by the voice of the public, or leaning on the back of a Commission.

ART. VII.—REPORT OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

Report of the Committee on Tribunals of Commerce.

At the Conference on the assimilation of the Mercantile Laws of the three United Kingdoms, the subject of Tribunals of Commerce was brought forward by the deputies from the Liverpool Chamber of Commerce, and at an adjourned meeting of the Conference the following resolution was adopted:—

“That the important subject of Local Courts, with compulsory powers and full legal jurisdiction over mercantile causes, is well worthy of the consideration of the Law Amendment Society.”

In pursuance of this resolution the subject was referred to a Committee, who have presented the following Report.†

The expediency of introducing into this country an exceptional Court to adjudicate in commercial disputes has at various periods engaged the attention of the mercantile classes, it being essential to the welfare of commerce that means should be provided for their speedy, equitable, and cheap settlement.

As early as the reign of Elizabeth¹, when commerce began to display considerable activity, and maritime assurances became common, the Legislature, with a view to encourage the amicable adjustment of controversies between assurers and assured, established a special Court for determining causes arising out of insurances in the City of London; and to this end empowered the Lord Chancellor to issue year by year a Commission consisting of the Judge of the Admiralty, the Recorder of London, two Doctors of Civil Law, two Common Law Barristers, and eight merchants, to be a Court for the determination of such causes, subject to appeal to the Court of Chancery. The number of Commissioners appointed as a quorum, which was at first fixed at five, was found to be too large, and was subsequently reduced to three², with a proviso that a Doctor of Civil Law or a Barrister at Law of five years' standing be always one. But owing to the anomalous position in which this Court stood towards the superior Courts of Common Law, and to its jurisdiction being restricted to the City of London, it soon fell into disuse. Objections had been raised relative to the authority of the new Court; first, that it did not extend to an insurance of the life of a person going to sea³, or to suits by the underwriters against the insured; but that which wholly paralyzed the new Court was a decision that a suit pending in it was no bar to a suit at Common Law. From the date of that decision no commission was issued, and all causes were again brought into the Common Law Courts.

The immense increase of commerce of late years, and the increased facility for intercourse with other countries, whether by sea or land, have produced a great change in mercantile transactions, and it cannot be doubted that more efficient means than now exist are required for the prompt administration of commercial law, especially in the large shipping ports. A number of cases might be stated in illustration; but it may be sufficient to quote the following general remarks from the valuable Report of the Liverpool Chamber

¹ 43 Eliz. c. 12.

² 13 & 14 Car. 2. c. 23.

³ *Bender v. Oyle*, 166.

of Commerce:—"It is as undeniable as it is intolerable that at this day, in the most civilized country of the world, the centre of trade and commerce, the simplest pecuniary right cannot be recovered, or obligation enforced, except at a cost frequently *far exceeding* the sum at stake, with a delay and harassment which, in the rapid requirements of business, is often tantamount to a refusal of justice, and with an uncertainty irrespective of either the law or the equity of the case, which too often induces the abandonment of the most undoubted right, without even an attempt to recover."

This state of things is ascribed, in the same Report, to the following causes:—

"1. The centralization of both Common Law and Equity in London, and the impossibility of getting a case above the reach of the County Courts originating in the provinces, tried at law, except at assizes held only twice a year.

"2. The greatly increased expense hereby arising out of the employment of *two sets* of practitioners: namely, the country attorney and his London agent, one of whom, at least, having no personal communication with the client, has no motive to shorten or economise the proceedings, but the contrary. Another evil attendant on Assize Courts is the very hurried and imperfect mode of trying cases, inseparable from the attempt to press a vast amount of business into the few weeks, or even days, during which the Judges of Assize are sitting, and the time lost by the complete cessation of law business in London during the vacations.

"3. The confessed incompetency of lawyers to deal with questions of accounts, or of the technicalities and usages of mercantile transactions: this is frequently exemplified in the termination of proceedings in Court, got up with immense expenditure of time and money, by reference to arbitration.

"4. Besides the long delay which is inevitable with the Assize Courts, and which, in numerous cases of mercantile pursuits, works practically to the denial or evasion of justice, there may be mentioned the formalities considered necessary for the proper maintenance of their dignity; the general

necessity of employing Counsel; and the rules of etiquette among the profession, which, in various ways entail an expense upon the suitors too often equalling, and not unfrequently exceeding, the amount at stake.

“ 5. The present system, whether amended according to the recommendations of the Common Law Amendment Commission, or unamended, affords no authoritative means for the speedy and inexpensive settlement of disputes and claims, the greater part of which originate in the ignorance, obstinacy, or dishonesty of one or both the disputants, and terminate at different stages of proceedings, short of actually coming into Court, but at an incalculable cost of money, time, and temper.”

The defects complained of in our judicial system in mercantile affairs are thus represented to arise from the want of local and permanent Courts; the want of technical mercantile knowledge in the legal profession; the heavy costs attending a common suit; and the want of a Court of Reconciliation which might dispose of many cases without resort to the ordinary Courts.

With regard to the remedy, attention has been directed to many parts of the Continent where there exist Tribunals of Commerce, generally composed of merchants, and with a lawyer, in some countries, as their president. Such tribunals are of very ancient date, and existed in the Italian States as early as the 12th century. They were introduced into France in the 16th century by Charles IX., owing, it is said, to the following circumstance. The king having entered one of the back rooms of the Grand Chamber of the Parliament of Paris and witnessed the termination of a trial between two merchants, which had lasted ten to twelve years, and which in its progress had nearly ruined both the litigants, was so much struck with the want of proper Courts for deciding such causes, that he resolved immediately to establish Tribunals of Commerce in all the provincial towns in the kingdom, where disputes between merchants might be settled both quickly and cheaply. These Tribunals or Consular Jurisdictions, as they were termed, were composed of a Judge and two to four Consuls chosen

from among the merchants. The Judge, called the Grand-Judge-Consul, was the head of the Tribunal, and the Consuls were his counsellors, but all had equal power. These Courts had jurisdiction over all commercial matters, except bankruptcies, but they were suppressed in 1790, when Courts with the proper appellation of Tribunals of Commerce were established, whose organisation was subsequently consolidated by the Code of Commerce, No. 615-648.

The election of the Judges of these Courts does not rest with the Crown, but with the body of merchants; though the royal authority is necessary for their installation. The Prefect of the Department draws up a list of the principal merchants of the district over which the Tribunal is established, and subject to the approval of the Minister of the Interior those in this list elect the Judges. The requisite qualifications of a Judge of Commerce are the following:— He must be a French subject, either by birth or naturalization, be thirty years old, and have exercised the mercantile profession for at least five years. The President must be forty years old, and have acted as an ordinary Judge in some Tribunal of Commerce. Half of the Judges retire from office every year, so that neither the President nor any ordinary Judge or deputy Judge remains in office more than two years. The number of the Judges for each tribunal cannot be less than two, nor above fourteen, exclusive of the President. The office is honorary. The Court has summary jurisdiction to the extent of 1500 francs, or about 60*l.*, in all mercantile transactions, including maritime questions, insolvencies, and bankruptcies; and, with the consent of both parties, the Court can decide in questions of any amount; but whenever the sum in dispute exceeds 1500 francs, there is a right of appeal to a superior Court. In all cases the employment of Counsel is prohibited.

The average annual number of suits brought before the French Tribunals of Commerce in the four years ending with 1849, was about 217,000. Of more than 23,000 cases subject to appeal that were decided in the French Tribunals of Commerce in the year 1849, only 2247 were appealed against: and in only 696 cases, or 31 per cent., was the

decision of the Court reversed; a proportion rather lower than that of the cases of reversal in the appeals from the ordinary Civil Courts.

Tribunals of Commerce were introduced into Prussia in 1847, and were directed to be established in all places of that country where required, on application to that effect from the merchants or Chambers of Commerce. The expense is borne by the State. Every tribunal is composed of a president (a doctor of Law), two other members who must also have graduated in Law, and at least four merchants. The Judges, whether legal or mercantile, have all equal power, and each has a deputy. The merchant-judges continue in office six years, and their service is gratuitous. These tribunals have sole and unlimited jurisdiction (subject, however, to an appeal to the College of Justice) in all mercantile cases, including shipping and bankruptcies. They are especially instructed to promote the amicable adjustment of disputes, and they may at any stage of the suit refer the case to friendly arbitration. Tribunals of Commerce exist also in Sardinia, the Two Sicilies, the Roman States, Spain, Austria, Portugal, Bavaria, Hamburgh, Lombardy and Venice, the Ionian Islands, and Malta; all based, with slight modifications, upon the constitution of the French Tribunals.

So far as your Committee can learn, these Tribunals of Commerce have generally given satisfaction to the mercantile classes in the countries in which they have been established; but, as will presently be seen, it by no means necessarily follows that in this country, where the circumstances are very different, they would afford equal satisfaction. Nevertheless, with such favourable reports as are received on the working of these Tribunals in the Continent, it cannot be wondered at that, considering the well founded complaints of the cost and dilatoriness frequently attending the decisions on mercantile questions in the United Kingdom, our merchants should turn their minds towards a system which seems so completely to meet their wants. The Liverpool Chamber of Commerce has consequently proposed the establishment of permanent Local Courts in towns and districts for the settlement of commercial disputes, the Judges

to consist of mercantile men, bankers, and traders of unblemished character, and of a given age, assisted by lawyers of a certain standing.

The Law Amendment Society has at all times recommended the extension of Local Courts; and there can be no doubt that the mercantile classes are peculiarly interested in having justice brought to their own doors, and administered with the least possible delay. Your Committee, therefore, feel certain that the Society will cordially support the Liverpool Chamber of Commerce in endeavouring to obtain local and permanent Courts for the prompt and economical administration of Commercial Law. The main peculiarity, however, of such a Court as that proposed is the introduction of men into our judicial system, chosen, not because they have undergone a judicial training or are thoroughly versed both in the principles and practice of Law, and have acquired the power of sifting and weighing evidence—but because they possess one special kind of knowledge, which, however important in a witness who has to speak to facts, may be held by a person nearly devoid of judicial talent. It should not be forgotten, too, that in a country where commerce is so largely developed as in England, each branch forms a system by itself, and that those who are most conversant with the laws and usages of one branch of trade, may often be ignorant of those of other branches. Moreover, it would be difficult to induce men in extensive business to devote their time to judicial duties for which they would receive no remuneration. Full responsibility can alone be looked for in a Judge who is paid for his services, and on whom the discredit of a bad judgment, instead of being divided among several colleagues, falls unbroken. The jealousy with which persons in the same branch of trade might sometimes regard the decisions of those whom they consider as rivals in business is also to be considered.

Again, in a country where the number of transactions of different kinds is so vast, and where one class gradually shades off into another, great difficulty would often arise in determining whether or not a case came properly within the jurisdiction of a Tribunal of Commerce; and difficulties would no

doubt arise such as have been entailed by the separation of Law and Equity, but from which your Committee trust the country will soon be relieved.

Lastly, your Committee would remark that every division of judicial functions tends to the creation of a multiplicity of Courts, each of them but partially occupied, and to a consequent diminution in the remuneration and qualifications of the presiding Judge, and to a lowering of the standard of the Bar. It is true that the institution of County Courts is not free from this danger; but in their case the advantages more than countervail; besides, by providing for the administration of justice near at hand, the whole amount is so largely increased that the evil of half-occupied Courts does not arise.

The Legislature has lately granted to the Court of Chancery power to obtain the assistance of accountants, merchants, engineers, actuaries, and other persons possessing special knowledge, the better to enable such Court to determine any matter at issue; and your Committee would recommend that similar powers should be obtained for the Common Law Courts, including the County Courts; and that the superior Judges should make their periodical tours and hold assizes more frequently than at present; so that such causes as cannot be tried in the County Courts may without the present delay be brought into the Superior Courts.

Your Committee would also strongly urge the reasonableness and importance of the suggestion of the Liverpool Chamber of Commerce, that the law should provide a ready means of carrying into effect the awards of arbitrators, whether by direct enforcement, or by supplying power to rectify an award when it is defective in the mode by which its object is directed to be attained. A Court of Arbitration is one specially chosen by the parties interested; and if the requisite authority were given to its decisions, objections to the constitution of other Courts would lose much of their weight.

Your Committee would also recommend that when in the case of a contract, bearing an agreement to refer any controversy to arbitration, one of the parties, by refusing to choose an arbitrator, attempts to evade the agreement,

power to appoint such arbitrator be given to the County Courts.

In the evidence appended to the Report of the Select Committee of the House of Commons on Joint Stock Companies in 1844, Mr. Hodgkin stated : — “ It has always appeared to me an anomaly that parties who have bound themselves by the most stringent terms to adopt a certain course of proceeding not only not illegal in itself, but which has by various Acts of Parliament received the express sanction of the Legislature, should nevertheless be at liberty to treat such an agreement as *nudum pactum*, which is practically the effect of the present decisions of our Courts both of Law and Equity, with reference to prospective provisions for references of disputes to arbitration. I think it would be desirable that in any legislative enactments the *onus* of showing that the case was not a fit one to be determined by the private tribunal of arbitration should be thrown upon the party seeking to escape from the terms of his own contract, and at the same time that where a reasonable doubt existed, the Court should have the opportunity of providing a remedy equally efficacious, and perhaps on the whole not much more expensive.”

Your Committee would express an earnest hope that the Commission which, in compliance with the application from the late Conference on the Assimilation and Improvement of the Mercantile Law, Her Majesty's Government have consented to appoint, will, as recommended in the resolutions of the Conference, be so constituted as to give confidence both to the legal and mercantile classes; and that its labours will result in such a simplification and amendment of this branch of law as, not only to facilitate the decisions of our Courts of Justice, but greatly to diminish the very sources of doubt and contention, and thereby largely to reduce the number of cases to be adjudicated.

In conclusion, your Committee submit for the consideration and approval of the Society the following resolutions : —

First. That it is not expedient to establish in this country Courts such as exist in several parts of the Continent under the name of Tribunals of Commerce.

Second. That it is nevertheless important by other means to afford increased facilities for the speedy and economical settlement of commercial disputes.

Third. That these means can best be rendered by giving a ready power of enforcing agreements to refer cases of dispute to arbitration, and for carrying out the awards of arbitrators; by gradually extending the jurisdiction of the County Courts as these Courts rise in character and public esteem; by making the circuits of the supreme Judges through the provinces more frequent; and by extending to the Common Law Courts, including the County Courts, the power lately conferred on the Court of Chancery, of calling for the assistance and advice of men acquainted with the usages of commerce, or having other special kinds of knowledge.

ART. VIII.—THE JUDGES AND THE CRIMINAL CODE.

1. *Copies of the Lord Chancellor's Letters to the Judges on the Criminal Law Bills of the last Session, and Copies of their Answers thereto.* (Lords' Paper, ordered to be printed 9th Feb. 1854.)
2. *A Letter to the Lord Chancellor, containing Observations on the Answers of the Judges to the Lord Chancellor's Letter, on the Criminal Law Bills of the last Session of Parliament.* By CHARLES SPRENGEL GREAVES, Esq., one of Her Majesty's Counsel, and JAMES JOHN LONSDALE, Esq., Barrister-at-Law, Secretary to the late Criminal Law Commission. London: W. G. Benning & Co. : 1854.

THE reference by the Lord Chancellor to the Judges, on the proposed Bills for consolidating the Criminal Law, and the results of that reference, which are the subject of the above publications, have raised sundry questions of a constitutional, a practical, and a personal nature, which it is of great interest and importance to the right conduct of public affairs, especially in relation to the Progress of Legislation and the Amend-

ment of the Law, to consider with attention, and indeed with a determination to put matters on a somewhat better footing.

Constitutionally, the relation of the Legislature and the Judiciary is involved.

Practically, the proper way of doing business, especially, as we have said, in reference to the Amendment of the Law, whether it be by Codification, or by Consolidation, or by Single Statute, or by judicial determination, or by official action, or how otherwise.

Personally, the conduct and competence of the Lord Chancellor, the conduct and competence of the Judges, the conduct and competence of the learned gentlemen who in the capacity of Draftsmen have been the instruments of writing these Criminal Law Bills, the conduct and competence of the several Criminal Law Commissioners and the ministers who instituted the Commissions of which these Commissioners were members, and lastly, though by no means the least, the conduct and competence of the learned and distinguished men who were members of the Criminal Law Committee of the Upper House of Parliament, by whom, to some extent at least, the Bills the subject of reference had been sanctioned and approved.

Our space will not permit us to follow step by step each of the considerations above indicated; but we recommend our readers to bear them in mind while perusing the Bills, the letters of the Chancellor, the Judges' letters, and the elaborate pamphlet of Mr. Greaves and Mr. Lonsdale, the Draftsmen employed on this occasion.

Our recent observations upon the Statute Law Consolidation Commission, the failure of which we anticipated from the want of purpose, the want of method, and the want of means with which it was instituted, and the suggestions which on that occasion we deemed it our duty to offer for the safe conduct of so important an enterprise, will have forestalled in some degree the exposition which we have now to offer; but there is so much of specialty in this branch of the subject, and its contribution to the success of the general subject of the Digest, Consolidation, and Codification of the Law,

which must take place sooner or later, is so great, that we must enter upon it fully and decisively.

The Chancellor, it appears to us, committed several errors in his Reference. It did not distinguish the matters; it begged the question as to the conclusive character of the Bills as models; and it seemed to say, Come and help me to defeat this measure. It was not in proper form; it was too loose in its shape, too epistolary, too much after the manner of familiar correspondence, almost as much as to say, This loose reference calls for only a loose answer; and considering that the Chancellor is *Ex-Officio* President of the House of Lords, it treated far too lightly the determinations of a Select Committee of that House, consisting of some of its most distinguished members.

We wholly acquit the Chancellor of any sinister purpose. Too little confident in his own powers, and too little reliant upon the authority of his own position, (although he be at times too much disposed to take upon himself, yet hesitatingly and misgivingly, the whole responsibility in matters which, on account of their universal application, must be shared by the experience and concurrence of others), he sought counsel from the sages of the Law with whom he had so long acted, and among whom he was not the least distinguished; forgetting that the office to be performed on the occasion was that of Statesman, Legislator, and Administrator, not that of Judge.

The Judges, with a facility of temper which men are apt to suffer when suddenly called upon to act upon matters to which they are unaccustomed, answered for the most part in the tone to which the Chancellor had given the key-note, and with a severity of criticism, which might well be spared by a class of persons who are themselves seldom successful when they undertake legislative labours: and though there is much pertinent practicality in their somewhat special and minute criticisms, it must be admitted that the direction which they have taken do not always do credit to their sagacity or their candour.

But we attribute these consequences, not to the personal character or conduct of the Judges, but to the nature, manner, and circumstances of the reference, which were such as almost

to give occasion to an inconsiderate or to an insufficient dealing with the subject.

We are not, for our own part, discouraged by the result, but desire to avail ourselves, and to urge others to avail themselves, of the experience of the failure to turn future opportunities to better account. In this spirit we enter upon the present disquisition, and would earnestly hope that our efforts may produce a new epoch in the intercourse between our Legislature and our Judicature, which may tend to make the Judges less prejudiced, and more intelligent and efficient coadjutors in the work of amending (and when amended bringing into execution) the Law, about which there is but one opinion, and one determination among the liberal—indeed we might say among all the intelligent—classes of the community.

Constitutionally we approve of such references as that we have now under consideration, to the Judges of the land; but it is with this distinct reservation that, if made, it should be of a right subject, at a right time, and in a right manner.

The more every entity of our mixed system is recognised, and on fit occasions used, the better is it for our Constitution, and the very characteristic working of our Constitution. Nothing is so absurd as to ignore anything or anybody; they always make themselves felt in proportion to our repudiation; our rejection not only begets opposition, or covert hindrance and mischief, but usually leads to (on our own part) the omission of some consideration or other, which an attention to all interests must have suggested, and the want of which generates or gives occasion for the failure of our efforts sooner or later.

It has generally been so with the Judges left out of the Councils; they have vindicated their position by perverse criticism of the Enacted Law, and have defeated by their reluctance, if not by their opposition, the objects of the law—for which occasion would probably not have been given if the Legislature, mindful of the position and probable views of the Judges, had been more solicitous to counteract these probable results, by considering in due time, with their aid, and

the proper means, the relation which the new Law will bear to the old, and preparing the Judges for its reception.

We do not say that the Judges have done these things by malice aforethought, with design or by intention; but the unconscious bias wrought in their minds has worked that way and produced these results more certainly than if the Judges had intended them.

But although we vindicate the reference to the Judges of all laws of extensive import, we deprecate its being done at the wrong time or in the wrong manner.

It should not be done before the measure is well considered and well matured by the persons charged with its preparation, under the influence and with the assistance of a criticism somewhat general, if not public; and on the other hand, it should not be done after the decisive action thereon of either branch of the Legislature.

We consider that the Judges are entitled to every facility which the execution of so important a thing as a reference to them implies, and they ought not to be put at issue with either branch of the Legislature. Not that we think the want of such facility is any justification for a sleight-of-hand dealing with matters referred to them, still less for making it an opportunity of giving a fling at the amendment of the Law; but because we would not lead those learned personages into temptation; and because we esteem it of no small importance that the people, the Legislature, and the Judiciary, should be of one accord in all the great principles of justice, and in the enactment and administration of the Law.

Nor, although we must confess our deep disappointment at the progress the Chancellor has hitherto made in the great work which God and his country have placed in his hands, are we disposed to fling in his face the manner of his action on this and other occasions; but believing that better things are before us, we prefer temperately to consider what practical manner of doing things is best calculated to produce those better things. Man's work, however blessed, must be done by human means, rightly devised, honestly pursued, and energetically applied.

The particular manner, then, of working the reference to the Judges of a legislative subject for legislative purposes, is one of particular importance; without which it is in vain to look for wholesome results, and without which all must be defamed:—the Chancellor or other authority by whom the reference is made, the Judges to whom it is made and by whom it is executed, and the inferior but useful order of men whose works are the subject of reference. Such has been the result in this instance. To avoid like results, we proceed to consider this special matter for our future guidance; and for the sake of a more effective elucidation of the subject, we will take it point by point under the following heads; without, however, adhering very markedly or very closely to these heads, the formality of which would expend too much of our space, and probably not make our observations more attractive.

1. On the Matter of the Reference.

2. On the Position and Qualifications of the Judges as Referees in such a Matter.

3. On the State in which the Matter of Reference is submitted to them.

4. On the Execution of the Reference by them.

5. On the Results of the Reference.

6. On the State in which the results are to be presented.

7. On the Use of the Results of the Reference.

8. On the Deference due to the Judge Referees.

9. On the Encouragement to make future Efforts of the same kind.

10. On the whole Matter.

The reference should not be of all things and sundry, but of definite matters—of questions admitting of an affirmative or negative answer—aye or no, or of at least some tertium quid as distinct and positive—of the institution of a comparison with known rules or standards—of matters within the scope of the experience of the Judges, cognate to such as they usually deal with; of such as they can deal with without derogating from the respect we all accord to their high office; moreover, of matters upon which the Legislature is likely to accept their determinations as conclusive.

Next comes the consideration of the position and qualifications of the Judges as referees; a subject indeed involved in the points we have just noticed.

The Judges are too high to be made use of, except for high matters. The gravity of their office demands that they should be used only on grave occasions.

Moreover, their office, though excellent in its uses, does, like many other excellent offices, disqualify for other matters in proportion to the excellence attained.

The Judges, as a body, are notoriously not men of the world, nor philosophers. They sit above others, and are accustomed to pronounce their determinations *ex cathedrá*.

Preceded by argument, these determinations are usually well founded; but the impatience of the labour of seeking by analysis and comparison the considerations to be regarded, which is the necessary result of this portion of investigation being commonly supplied by others, the result is not so favourable when such facility is not afforded.

Therefore in matters not judicial, or not judicially conducted, they are apt to be not as other men, but worse; to stand more by the rule, than by the passions or affections of mankind—those things which rule the Statesman and the Legislator through the agency of the influences to which the powers that be are subjected by the action of our Constitution. Their sense is not the common sense; their logic is not as other men's logic. Their pleasantries are not like others' pleasantries. If they are wise, they are more wise than others; and, sooth to say, if they play the fool, it is, we fear, sometimes with more folly.

Now this being so, these grave personages ought not to be tempted, and, still less, by one more grave. It is unfair play. It is an unseemly exposure of human weakness; sadly detrimental to the character of the office of Judge, and disparaging to the excellent qualifications which they undoubtedly possess.

Therefore the state in which the reference is made should be precise, complete, formal, even ceremonious. It should show the mind of the authority referring to be full of the antecedents of the matter—of the existing state of things—

of the grievances which the measure is intended to meet—of the expedients which have been used, and wherefore—of the special expedients proposed, and wherefore—of the difficulties to be encountered—of the extent to which they have been met—of the extent to which it is impossible to meet them; and the reference should then be, first, to supply omissions; secondly, to point out failures and inconsistencies; thirdly, to afford such suggestion as may occur of matters within the scope of the judicial function, especially with regard to the facility to be afforded, or the hindrance occasioned in the exercise of the office of the Judicial Referee. Broad principles, claimed by the common sense of mankind, special principles, claimed by the feeling of the country, or by the wants or occasions of a class, do not fall within their scope. They systematically reject them. They appeal to the instrument or law by which their jurisdiction is created. They rest upon it, eschewing all temptation to regard objects and purposes not declared by the instrument. Having a rule, they regard it as their duty to act upon it. Wanting a rule, their first effort is to seek one. They feel, and justly, that while they should be seeking principles, the justice of the case before them is lost; that to go beyond the rule is to doubt; and, doubting, to plunge themselves in the mist and criminality of Eldonian dubiety and delay.

Such being the habit of the Judges, how singular is it that they should claim the retention of the Common Law as a means of escaping from difficulty. None have so limited and restricted the Common Law as the Judges, substituting for principle precedent, and in the attempt to find rules by that means really unruling themselves. We shall not stop now to investigate the source of this delusion, which could be dispelled without difficulty by a history of judicial doubts created by themselves, and which the Legislature has constantly been applied to to settle.

But to our present task of Judicial interposition in Legislative matters. Reference being made, the severer task of analysis should be so well worked out by active minds, as

in other judicial cases by advocates, pleaders, agents, the draftsmen and officials concerned, that the Judges may have little more to do than to pronounce whether the matter be right or wrong in the several phases in which it is presented.

This implies an elaborate investigation of past matters; a collection of old cases and old difficulties and old attempts to cope with them; and that the execution of the reference should, as a means of success, be as painstaking and exhaustive as the trial of cases to which its results are to apply, so far as the dealing with speculative matters will admit; and this is less difficult than is supposed, for the past furnishes a type of every future possibility in its nature, though not in the precise form and features of its presentation.

The steps of the execution of the reference should therefore be marked out and followed systematically, much after this manner:—

1. The reception of the statement or document; the consideration, of the object and the occasion of its terms,—and its effect.

2. The reception of the objection to the matter and to the manner.

3. The reception of the explanations.

4. The reduction of the matters still in question into the form of issues.

5. The trial of the questions or issues.

6. The argument on the facts ascertained.

7. The consideration of the determination.

8. The statement of the determination.

9. The revision of the document.

10. The formal passing of it in its complete state and transmission to the referring authority.

The procedure should be marshalled in such a form that the arguments would be presented in due logical order, so that at the proper time the minds of the Judges would be ripe for decision. These arguments conducted in public would give animation to the proceedings, would invite public attention and argument, and protect the subject-matter from neglect.

The Crown should employ counsel on its behalf, and on behalf of the different positions to be insured; and the whole matter should be conducted as nearly as possible after the manner commonly pursued in the solemn argument of a case before a full Court in banco.

The Judges, sitting thus in solemn form, would be (generally speaking) as grave as the business requires; they would moderate their pleasantries, and the results would befit the occasion. These results should take the formal shape of a report to the Crown, or to the Chancellor on behalf of the Crown; and the contents should be so ordered as to bring out a common conclusion. They should not take the form of fourteen letters delivering as many different views; or if it be preferred that the opinions should be given independently, then the results should be presented in a connected form, with an outline, an index, and explanatory notes, showing the extent of the agreement and the extent of the differences, distinguishing matters fundamentally or wholly objectionable from matters objectionable merely in mode, or order, or terms, and remediable by fresh efforts directed to that end.

The Chief Baron suggests a course somewhat after this sort, and a suggestion from so experienced a lawyer, some-while legislator and statesman, ought to have its weight; and we earnestly trust that the Chancellor will consider it.

Some years ago (in Papers relative to the drawing of Acts of Parliament presented to Parliament in 1838) a similar course was suggested, and it was also proposed that it should be the duty of the Judges to cause to be reported the doubts and difficulties that arose on Statutes (which would be an admirable assistance to the Legislature, and not open the same objections as an *à priori* reference to the Judges of Laws which are to be subsequently adjudicated upon by them), and that for that purpose they should be enabled to appoint official reporters.

The Judges having made their report, it should be received with due consideration; and the utmost deference shown to the functionaries whose services should have been so employed. This consideration should be impressed on

the minds of all at every stage of the matter. It would check improper references; it would prevent their being submitted in a careless manner; it would demonstrate by its own specific character the fitness of the Judges for it; it would induce those personages to act thoroughly and painstakingly; and it would beget a harmony between the Legislature and the Judicature, the want of which is one main cause of the defect of the Law. Each body too much despises the other, or the acts of the other; in this particular, not regarding the special offices of each, and not recognising the fact that, though the office of each is special, the end is a common one, to which they are both, in their respective measures, contributing by their proper action.

In our self-sufficiency we of the modern day are beginning wholly to disregard the diplomacy, the ceremonies, and the courtesies of the elder time; the art of bringing men to act together in an orderly manner for a common purpose, with mutual respect and regard, or, at least, with that semblance of it which makes the machinery of society move without needless friction and collision.

The Judges may reasonably demur to being called upon to do the work of the Legislature without the Legislature's means: to have grave documents pregnant with the weightiest considerations referred to them so slightly, as if it were a letter to be read at a leisure moment. Nothing implies so much labour as law-making. The mind has to go back on past experience, to collect scattered memories of things long gone by, to speculate on all possible applications, on new developments of old principles and practices, on past failures, the why and wherefore; and having fed the mind by the recollection of old stores and by the acquisition of new, to reduce the chaotic mass into the practical shape of principles, and then part by part, sentence by sentence, word by word, to try the document submitted. Old men, or even men past forty, who have the warp of an old training in another direction, cannot do these things with much effect, or if they could they would not be the grave and reverend seignors whom we expect our Judges to be, but imaginative fellows whose

judgments mankind, somewhat unjustly, are not disposed to trust. But be the result what it may, the labour is enormous. It surpasses all other things, put aside, that the mind dwells upon the matter for a while, at all times and in all places. In Term time and at the Assizes this is impossible; and in the Vacation more than mortal man will submit to.

The sensible thing would be to make the Judges, like other officers, contribute their quota of special service to Legislative matters—to make it a part of judicial duty to be done in the period of the Legal Sessions, in Court, and, as we have before intimated, with the assistance of counsel learned in the law, before the world, under the notice of the reporters, and altogether after such manner that the public may sit and look on, and be helped to its conclusions by the same means that the Judges are helped to theirs. Parliament observing the public acquiescence will acquiesce also, and be ready, when the question is ripe, to enact the fit Law.

The enlarged employment of judicial action on such matter would lead to enlarged apprehensions and enlarged notions by the judicial mind, and be the prelude, and a necessary prelude, to a complete fusion of the Equitable and Legal jurisdictions. The failure of the Judges in making rules is due to their want of tutored legislative aptitude, as well as indeed to their not performing in regard to these acts of sub-legislation the necessary preliminary of digesting the matters and the rules under proper heads, and recording under these heads the cases of difficulty that arise.

In the same way, they fail in construing Laws from the want of consideration as to the necessary construction of the legislative instrument; a course, however, for which they derive an excuse from the want of uniformity in the methods adopted by the Legislature.

The whole of the criticism of the Judges on this Reference shows the want of a thorough statement of the primary objects and considerations, and of the practical objects and means to be regarded in this species of enterprise. They have started upon the task without considering the basis of the operation.

The criticisms which they have given contain much valuable

matter, but they are too unconnected, and have too little relation to any data to make it so entirely useful as it might have been. If the Judges had had the assistance of a secretary or organ to reduce these criticisms into proper form, they would have been more creditable to them as well as more useful to the Legislature.

The views given in regard to codification, to consolidation, to the partial enactments of the Criminal Law, to the substitution of Statute for Common Law, to the form of the statute, to the language of the statute, to the definitions, to the enumerations and descriptions of matters, and to the modification of crimes, ought to have been treated and put together with the parts of the Law to which they relate. It would have been found that many of the suggestions admitted of being met by easy amendment, and other parts would have led to explanations, and extensions of the plan, which being developed would have met the larger objections.

Upon this head we had made sundry particular illustrations before we received the pamphlet (noticed at the head of this Article), by Mr. Greaves and Mr. Lonsdale. These gentlemen have conducted their production temperately and judiciously; and though we do not concur with all their statements, we may say upon the whole satisfactorily. What a pity it was that the Judges did not have these gentlemen before them, to offer the explanations which now come so unfitly, after they have made their reports.

We have dwelt upon this topic of Judicial aid with more emphasis, on account of its bearing on the general question of the Codification and Consolidation of the Law which now hangs tremblingly in the balance.

Great apprehensions are felt by some that the Chancellor, disgusted with the miscarriage of the temporary Commission, will throw over the subject altogether. We should deeply deplore such a result: and we believe that if the papers of the different Commissioners should be subjected to a fair and open investigation by men conversant with the subject, it would be found that the only thing wanted has been, and is, a practical, business-like mode of working.

The faults of the last Commission, the placing a delibera-

tive matter, so various and complicated, under the immediate superintendence of the Chancellor, aided, not by a secretary who could have framed, in the form of instructions or some other convenient mode, the views of the Chancellor, and kept him *au courant* with the subject, but by a gentleman of too much personal independence to be amenable to the Chancellor, on the one hand, or solicitous to conciliate the gentlemen appointed to assist him, on the other.

Under this state of things differences sprang up, and the Chancellor was not accessible to settle them.

We do not blame the Chancellor; he was led to imagine the work to be of an executive, and not of a deliberative character; that it required action simply, and not the determination of the principles to be acted upon.

From this fatal consequence he could have been saved, if he had sought help from the disinterested persons, conversant with the subject, who had proffered their aid.

The Chancellor, as we have said before, is entitled to great praise for starting the work; it would be disastrous to his authority and position now to abandon what has been so generally welcomed.

The tone and spirit with which it has been discussed by all the press, of whatever party, proves the general concurrence of sentiment; and it would be a sad thing, if the Chancellor should so far lose his dignity as petulantly to discard an enterprise so desirable to the nation and the successful conduct of its affairs.

It is said that he is considering the Reports; but we deprecate a consideration by means of reference to acquiescing satellites more solicitous to catch his humour than that of the nation. We trust that the papers will be published, analysed, and indexed, and that the valuable propositions with which, no doubt, they abound will be abstracted and stated *seriatim*.

The very men whose opinions stated in private, at a hurried interview, or in a bye corner, at the Palace, at the House of Lords, at the Court of Chancery, at a dinner, or at a soirée, would be worthless or dangerous, on account of their catching too easily the humour of the interrogator,

would in all probability be most valuable, if stated responsibly, after due inquiry and consultation.

The disasters of the last twelve months are mainly due to the want of an open method of proceeding, and of a free conference with all men conversant with the subject.

The Chancellor owes it to his own dignity, to his own uprightness, to his desire to do a work of such excellent utility and so worthy of his office, to take the manly course of accepting freely, without grudge and without regard to the source, the services of each and all of the persons who have addressed themselves to these matters.

It is a matter of common regret that the Chancellor does not rely more upon his own good sense and capacity, and where his opportunities, or his means, or his personal qualities and habits fail, does not supplement his powers by the powers of others, especially where those powers are placed at his command without hope or expectation of reward.

The Consolidation and Codification of the Law, difficult though the task may be, is one which would repay the labour and expense, if properly set about, and one about which so many feel now an interest, that no reluctance on the part of any officer, however high, will check or repel; on the contrary, we feel assured that the moment that it shall be declared that the Chancellor or the Government will not proceed with the task, a determined action and unrelenting prosecution of the subject will ensue.

This feeling is strongly rooted, and has no relation to persons; neither springs from nor has its end in a job, but in the sense that all our reforms of tribunals and procedure are fruitless or perilled, so long as the Law to be thereby administered is not accessible to the Judges.

"To be or not to be" is not *now* the question. Of all the public men, of every degree, with whom we have conversed on this subject, there is not one who denies the necessity of the object and the feasibility of its execution in some form and to some degree; Members of the House of Commons (we believe the feeling is shared by the Peers) deprecate the task of legislation which is thrown upon them without the means of finding anywhere a connected or intelligible state-

ment of what the Law is which they are required to amend. They give a reluctant, blind, and unacquiescing support, simply because they do not know what they amend, and they state that they would cheerfully adopt any proper plan of Codification or Consolidation, if the Government would frankly set about it.

We are reluctant, pending the consideration of the subject by the Chancellor, to say much on this head; but knowing how greatly he has failed through his timid conscientiousness, so detrimental to his good sense and fine qualities, we could not abstain from pressing considerations that might assist his conclusions, and from tendering, on the part of the amenders of the Law, earnest and disinterested support, if his Lordship will, Napier-like, but lead the way. We are bound at the same time to state that in no quarter is there a disposition to acquiesce in a judgment in the negative founded upon the means of judgment now in his Lordship's hands, which, however excellent they may be, it is known are not the joint productions of the Commissioners, and are deficient in the contributions of several of the persons whose labours have been specially devoted to the subject for a very long while, and who have not had an opportunity of affording either to the Chancellor or to the late Commission the assistance which they were willing and able to give.

ART. IX.—PUBLIC COMPANIES AS EXECUTORS AND TRUSTEES.

It is curious, but not less true than curious, that the rapid advancement of civilisation and improvement in a particular country, is proved by the fact that the machinery of a government becomes incapable, without frequent, almost constant additions, to meet the ordinary wants of its citizens. The difference between a despotic and a free state is then most strongly exhibited. The first affects to provide at once for everything that is required. It assumes its own capacity

to know everything, to manage everything, to settle everything. This is an evil; for if a want has been felt, the chances are ten to one that the government, in pretending to provide for it, fails in everything but in the display and exercise of its own power, and shows most lamentably and painfully that its assumption of capacity is in every other respect mistaken. In a free country the reverse of all this is the case. The government does not readily undertake to provide for even a clearly ascertained want; it leaves the citizens to help themselves if they can, plays the part of Jupiter in the fable when suggesting to the carman to put his own shoulder to the wheel, and see what his own horses can do to extricate him out of the difficulties of the ratty road, and in short, acts upon the principle that there is to be no governmental interference unless the *nodus* is one in every way worthy of a supernatural effort. This is no doubt exceedingly distasteful to those whose impatience would have every little impediment (however little it might be) removed at once, and by authority, and the whole course of public and private business made of a theatrical smoothness as if by the magic touch of a Harlequin's wand. With such people, indeed, the end is everything — the means nothing. But the means go for something with other men who think that, in relation to what may be called public business, or the business of life, the advantages of making popular the habit of self-reliance constitute a most profitable balance to the comparative benefit of an instant appeal to authority. We confess ourselves to belong to this class of thinkers, and if the government manifests any reluctance or hesitation about carrying into effect anything which the experience of private life has shown in numerous and widely extended interests to be necessary, we cannot but believe that its introduction by an association of individuals is a matter for gratulation. The required improvement is all the better—even more quickly—established by the energy of an association than by the authority of a government. If the forethought which now provides against the consequences of loss of life, or against losses occasioned by wreck or by fire, had waited till the government took on itself what we now call “the business of an insurer,” it may readily be imagined

that thousands who are at this moment living in comfort would have been steeped in poverty, perhaps crushed by destitution. The habit is confirmed and strengthened by exercise. Insurances, which were originally applied only to protect individuals against losses consequent on the perils of the deep, have gradually been employed to mitigate those which arise from the accidents of fire; and finally, science has been invoked to calculate the extent and dangers of constantly recurring risks of other sorts; the duration of life has been measured, the continuation of a profitable employment, the hazards of railway travelling, and even the value of a man's honesty and fidelity in business, have been successively brought within fixed and ascertained limits, and assurance and guarantee societies have sprung up on every side of us. The power and authority of the Government have not been crippled by these various associations, nor has the privacy of social life been injuriously invaded by them; but, on the other hand, the welfare of society in matters where the Government could not have interfered with advantage, has been marvellously promoted.

Believing, as we do, that these have been the results in the cases thus noticed, it cannot be matter of surprise that we should view, not only without alarm, but with positive satisfaction, a scheme to create a corporation or corporations to administer trusts and perform the duties of executors. To be startled by a novelty, because it is a novelty, is not a practice encouraged by the habits of thought and the experiences of the present day. Some men still indulge in that practice, as some men (they are very few in number) will still persist in wearing hair powder and pigtails; but the world at large is now disposed to try the merit of anything not by the question whether it is new or old, but whether in itself it is useful, profitable, or agreeable. Tried by such a reasonable standard, the plan of an Executor and Trustee Corporation has undoubtedly its advantages. In the first place an executorship or trust is not likely to be wholly defeated either because the party chosen to discharge the duties cannot or will not act, or because his death happens at the beginning or in the midst of his execution of them. The Corporation having once accepted the trust cannot reseal, as a

matter of honour and of interest it must go on; for though the trouble in the particular case may be greater than the commission received for the labour will compensate, still that is but one of the chances of a varied employment, and to give up the labour in one case on such a ground would be to abdicate all claim for employment in every other instance. The work must be done, and for a similar reason it must be done well. If the Corporation neglects or inefficiently discharges its duty in the case of A, it could hardly ask any of the other letters from B, downwards, to repose trust in it. And as the payment for its labour is to depend on the amount it hands over to the parties beneficially interested, those parties thereby enjoy the advantage of a guarantee that that labour will be economically as well as efficiently performed. A paid executor or trustee, if you could secure the honest discharge of his duty, would be in most cases better than an unpaid one. His interest would be a stimulus to his exertions, instead of being, as it often is, a drawback on their activity; for no one who has ever taken part in the business of life, can doubt that an executor or trustee is, under the present state of things, frequently called on to perform duties which are, at the particular moment, not only a cause of inconvenience, but a loss to him. His own private concerns require him to be at the Docks or at Westminster at precisely the moment at which his executorial duties require him to be in the Stamp Office or at the Bank. Till a private gentleman can acquire the enviable faculty of Sir Boyle Roach's Irish bird, that of being in two places at once, he must submit to the discomfort of choosing between the two, and must bear the anxiety and loss consequent on the preference given to either. Suppose him to sacrifice, on one occasion, his interest as an individual to his duty as a trustee, no one can doubt that he will afterwards use any endeavour and avail himself of any excuse to avoid a repetition of the sacrifice; and that even, should he repeat it, the duty he performs will rarely be executed in that calm, clear, and satisfactory manner which might be expected from him if his mind was not distracted by the thought of other and neglected occupations. Every man knows that for this reason he finds it difficult to assure to himself an executor

both able and willing to perform the duties of one, for even if among his acquaintances there should be several capable and trustworthy men, it is most probable that he will find those very men the least ready to undertake the troublesome, thankless, and often disagreeable task. Unite their interest with their capacity, and the result will be very different. An executor who is paid to do his work will feel that he is under an obligation to do the work for which he is to be paid. Sensible that this is the fact, many persons (whose property enables them to spare a certain sum from their families) give to an executor "in acknowledgment of the trouble imposed upon him," some particular sum, or make him the legatee of the contingent residue, and, so far as our experience goes, the wills where some provision of this sort has been made, have not been the worst or the most slowly administered.

A fair consideration, therefore, of circumstances and of the business of life, leads to the conclusion that paid executors and trustees have become a necessity of the age. The question then arises, whether they should be official persons constituted under government authority, to whom the administration of all wills and trusts should be officially assigned, or should be private persons legally empowered to act, obtaining employment only from those who choose to use their services, and receiving a fixed and measured payment only in proportion to the services performed.

This question is, however, narrowed by the consideration that, though some persons might prefer the former to the latter arrangement, the Government hardly offers them the choice. It does not stir in the matter. Up to this time no one has asserted it to be the duty of the Government to become the universal executor and trustee of English subjects, and until the undertaking of a new labour is clearly shown to be a public duty, the Government itself is not likely to be desirous to undertake it. An English Government has rarely done anything of the sort. It did not set about making railways, and it has gladly availed itself of the steam-ships of private companies (instead of building them for itself), in order to effect the postal communications which in its sovereign capacity it admitted or assumed itself bound to effect.

It has left insurances of all sorts to the care of private companies. Why then should it not leave to private companies executorships and trusts. The opponents of the plan to establish a company for such a purpose say that there are several reasons why it should not do so. First, they allege that such a company is objectionable as removing the sacred veil of privacy from the affairs of a family. The objection looks very sentimental, but it is not very sensible. In the case of a will the means of publicity and the chances of using them already exist. For a shilling, no very great sum to check the excitement of the curious, any one may see any will registered at Doctors' Commons. Do men rush thither in crowds to gratify that curiosity? Not at all. When the immense amount of property which year by year is disposed of by will comes to be considered, when it is recollected how many thousands of persons must be interested in knowing the disposition of that property, the wonder to any man who entered the office would be how it came to pass that the searchers were so few. In practice, therefore, so far as the present system exists, the terror of publicity appears sufficiently absurd and ridiculous. But still more ridiculous does that terror appear when it is avowed to arise solely from the fact that a company, "a *public* company," as it is alarmingly called, will have the management of the business connected with the will. The alarmists seem to suppose that the "public company" will have nothing else to do but to invite and gratify the morbid curiosity of all the idlers of the town; telling them everything about every property in everybody's will. All sensible men know how contrary such a fancy is to the fact. The pressing necessities of business render a folly of that kind absolutely impracticable; the merely curious inquirer will be referred to the registry at Doctors' Commons and those alone who can show themselves to be interested in the provisions of a will, can be allowed to take up the time of the company's officers in examining or discussing them.

Secondly, it is said that it is unfit to entrust the management of trusts of any kind to a corporation, which proverbially has no individual feeling to be acted on. This is a

strange objection, where the duty to be performed is not that of discretionally applying fixed rules to varied circumstances, but that of effecting settled purposes on the happening of pre-ordained and pre-determined events. Where the virtues of generosity and magnanimity are to be exerted, a corporation is undoubtedly not the body to select for the display of them, but where a strict and ascertained duty is to be performed, generosity and magnanimity become impertinent intruders, and the exact rule of right is alone the rule of propriety. In such a case that which has been objected to a corporation becomes its recommendation; since the directions of a will, or the stipulations of a trust, are required by law to be literally performed, and are not, with impunity, permitted to be evaded, even though the most disinterested grace and favour should suggest, or consent to their evasion.

Finally, the vesting of property in a corporation, even for the purpose of testamentary trusts in favour of individuals, is said to be objectionable in principle. Now the general principle thus intended to be asserted may be admitted to its fullest extent, and yet the objection attempted to be founded upon it will not arise.

Let it be granted as a settled rule that landed property ought not to be vested in a corporation: this particular case would present the instance of an innocuous exception to this excellent rule. The vesting of property under a will in the Executor and Trustee Corporation will not be perpetual but temporary. It will continue solely till the purposes of the testator or settlor can be accomplished, will be subject to all the rules which the will or trust has imposed and to all the duties and liabilities which the law creates, will confer no power but what is to be found in the will or deed, and give no authority beyond that, which, for the accomplishment of the same purposes, would be vested in an individual trustee. The only difference between the individual and the corporation will be this—that whether the trust is to last for one or for twenty years, the corporation will continue seised as long as the trust requires that it should be so, while the individual trustee might die within a week after the estate was vested in him, and his death would occasion a necessity for legal

proceedings, the costs of which must be paid out of the estate of the persons beneficially interested, who might besides find their interests by the operation of law entrusted to some one wholly indifferent to the careful and regular discharge of the duty which had thus accidentally devolved upon him. In all respects but this one the corporation for the purpose of such a trust, is the same as an individual, and in this one respect the difference is all in favour of the corporation, so far as the advantage of the persons interested in the property is concerned. In no respect whatever can the public interests be injuriously affected by this special, and specially guarded, vesting of property in a corporation.

We have noticed these objections which are said to be "objections on point of principle," because a powerful body, "an influential interest," as the fashionable phrase of the day goes, has declared itself to be in opposition to any Bill for creating a corporation to discharge the duties of executors and trustees. The Solicitors, or at least such of them as sway the councils of the Law Institution, waited on the Lord Chancellor at the beginning of the Session, to state their objections to the proposed measure, and now continue their opposition through the medium of their authorised journal, and threaten every possible resistance in Parliament. The House of Commons has not shown itself to be affected by these objections. The South Sea Bill has already passed that House and the Bill of the Executor and Trustee Company will have passed it before this article appears. Nor will the House of Lords refuse what the House of Commons has sanctioned. One great legal name among the Peers is understood to have declared his hostility to the Bill, which proposes to create a corporation for the purposes we have described—and the Incorporated Solicitors have actually gone the length of petitioning the House to be heard by counsel against the South Sea Bill. We write this after the application so to be heard by counsel has been made, but our observations may possibly be printed off before that application has been determined upon. Let us therefore guess at the objections which may strike the minds of the Peers against entertaining such an application.

First, it is clear that in order to establish a title to be heard by counsel against a Bill the applicants must show a particular and special interest in respect of which they are injuriously affected by it. In what respect does any such interest threatened by the Executor and Trustee Bill exist among the solicitors of England. The Bill does not propose to vest in the Company the power authoritatively to decide on the validity of testamentary papers, on the construction of wills, on the proof of the claims of persons who seek to be treated as persons interested in their administration, nor on the relative rights of creditors and legatees. All these and many other subjects of the same kind must remain as at present subject to contentuous litigation in our various Courts. In putting a stop to these sources of profitable employment for Solicitors, the proposed Company can therefore exercise no dangerous power. The world must go on much as before, and whether a sensible and *bonâ fide* claimant, or a mere Peter Peebles shall raise the discussion on a trust, or a will, the authorised Courts of Law and Equity can alone possess the jurisdiction to decide it. Surely then since the regular business of the Solicitors cannot be injuriously interfered with by an Executor and Trustee Company, the Solicitors can have but little claim to ask protection against a Bill to constitute such a Company. If indeed the Company proposed to engross all the law business that must necessarily be performed, and to monopolise it for the benefit of certain Solicitors appointed by itself, there would be some ground of complaint. But this is exactly what the Company expressly declares it does not intend to do. Where the testator, or settlor, or the parties interested, shall desire any particular Solicitors to perform the law business, they will be employed in preference to any one else; where no such desire is expressed, the Company will either employ one of its own Solicitors, or should they be already encumbered with demands upon their time, will select such Solicitors among its shareholders as shall have the fairest reputations in the profession for skill, ability, and integrity. In no way whatever are the honest business interests of the Solicitors interfered with, and we will not do

the Solicitors of England the injustice to suppose that they would set up, as matters to be protected, any unfair interests, and say that the present system gives rise to such interests, and that because it does so they ought to be maintained. The Solicitors are at once too honourable and too prudent to set up any such demand, and if so, then there is no other in respect of which they can appear as the private opponents of a Bill which, though only authorising a private Company to undertake a private service, will thereby confer great benefits on so many individuals that it may fairly be considered a good public measure.

It is true that, assuming to themselves the title of protectors-general of trust estates, the Solicitors raise a great objection to any trustees who are not now paid for their services, being allowed to transfer to a Company which is to be paid for its services, the right to execute any trust. They say that this is to throw on the trust property a pecuniary burden from which it was originally intended to be free, and to which it ought not now by any act afterwards arising be subjected. The objection is specious, but not sound. In the first place it is probable that there was no intention to prohibit payment for the services required, that no intention whatever existed upon the subject, but that it was assumed that the trustees would act in the ordinary way, and so no one thought one word about the subject of their remuneration. In the next place it may be that the private occupations of the trustees have been found materially to interfere with their active and regular discharge of the duties of the trust, or that circumstances have compelled them to reside at places where the active and regular discharge of those duties is very inconvenient or must be effected through expensive and troublesome processes, and in either case the testator or settlor, if he could have foreseen these circumstances, would have consented, and the parties beneficially interested would now desire that any other respectable persons who might be relied on, and who would perform the trust in consideration of a small payment for their services, should be selected to discharge it. Suppose the settlor to be, like the testator, dead,—surely the parties beneficially interested are those who

have the full right to determine whether they are ready to pay to get their business well done, or to leave it ill done, or not done at all, because they will not pay. With them will rest the determination of the matter. The Company can only be employed by those who desire to employ it. It is not to have the power to force men to be its customers; they must seek it out and invest it with authority, and set it to work, and they will have to pay for what they have so done. There are instances, well-known instances, in which large trust estates would have been much benefited could the administration of them have been taken out of the hands of the negligent and incapable individuals in whom they were vested and have been transferred to a public Company whose business was regularly and skilfully transacted.

Aye, but say the objectors, a private trustee is responsible to the whole extent of his fortune for breaches of trust, and by the Executor and Trustee Bill no personal responsibility is to exist in the Shareholders of the Company. Do these objectors think that men in general are so utterly devoid of sense that by the mere contrast of the words "responsibility" and "no responsibility," they can be led to believe that the new Corporation is to be left at liberty to play at ducks and drakes with the property entrusted to its care? They must think so, or they would not put forward such a statement and affect to call it an argument. The individual Shareholders are certainly not to be subject to any personal responsibility beyond the amount of the Shares for which they have subscribed, but that liability amounts to the whole value of the subscribed shares. In the first place, a guarantee fund is to be formed. It is to be fixed at the sum of 100,000*l.*, *perpetually kept up*, so that should there be a judgment against the Company for any sum whatever, the amount of that sum being taken by the judgment from the guarantee fund, must be immediately replaced, or the Board of Trade can stop all the operations of the Company for a time, and at the expiration of that time, if the guarantee fund shall not have been made up to its full amount, the Board of Trade can wind up the Company at once. Such are the provisions introduced into the Company's own bill,

provisions more stringent than are really necessary for any purpose of reasonable security to parties interested, and the offering of which implies, on the part of the Directors, not only a readiness to guard against any possibility of loss to such parties, but a pretty strong consciousness that nothing to occasion such a loss is ever likely to happen.

On the whole there seems every reason for saying not only that the want of some machinery to supply the deficiencies of private trustees is a public want, but that the means now taken to supply it are such as to deserve the confidence and the encouragement of the public.

ART. X. — PRIVATE BILL LEGISLATION.

It is now eight years since Lord Brougham laid upon the Table of the House of Lords, twenty-four resolutions in which he exposed the evils and anomalies of the present system of Private Bill Legislation. He showed, in forcible language, the extraordinary importance of such legislation,—the amount of property interfered with,—the interests affected,—the rights and privileges conferred,—and the total inadequacy of the judicial machinery provided by Parliament, for administering justice to the parties, and protecting the interests of the public. On the 11th April, 1854, his Lordship moved that these Resolutions should be re-printed, and they are now before us. We have been informed that his Lordship introduced his motion by observations well calculated to arouse public attention to the subject, at the present time, and that Lord Monteagle added some judicious remarks: but as the discussion related neither to the War, nor to the Reform Bill, the reporters shut up their note-books, and withdrew for the Easter holidays.

The question of Private Bills has often been discussed in this Journal, and we are not without hope that the time is, at length, approaching when one of the most important of all the Law Reforms, which we have the honour of advocating, is about to be accomplished.

When the evils and abuses of Private Bill Legislation were first exposed, any attempt to correct them was almost hopeless. The railways were paying ten *per cent.* dividends, and offering eight *per cent.* guarantees,—great companies, with the resources of monarchs, were contending with one another for territorial aggrandisement,—while powerful landowners, in Parliament and out of Parliament, were paying off the incumbrances upon their estates, by the price of a few of their out-lying acres, extorted by fear or favour, from rival companies. All the great interests of the country were then concerned in railway speculations. Lawyers, engineers, capitalists, Members of Parliament, landowners, and stock-jobbers, were drawn within its influence, and Parliament was the central focus to which they were all attracted. All were seeking their own interests, and all but the shareholders had reason to be satisfied with the result of their exertions. Never was money more freely spent. It was a war-expenditure, incurred recklessly at the time, and grieved over, when it was too late. The railway interest is now borne down by the consequences of their recent mania. In some lines the shares are less than half their former value, the dividends of all the railways in the kingdom are reduced, and many promising undertakings have been brought to the verge of bankruptcy and repudiation.

While fighting, intrigue, and jobbery were in the ascendant, and every one was soon to be rich, prudent counsels were of no avail. The Parliamentary system was part of the lottery, in which there were so many prizes, that really nothing could be better. At length, however, the parties most interested are awakening to a sense of the delusions which have been their ruin. Mr. Laing, the able chairman of the Brighton Railway Company, estimates the loss sustained by Parliamentary contests at seventy millions! other competent witnesses have shown that at least one-third of the mileage sanctioned by the wisdom of Parliament has been too bad for any one to make. And to what cause are these evils now ascribed? To the very system, which, a few years since, was pronounced so perfect! We are constantly hearing now of “the faulty system of railway legislation

adopted by Parliament," from those who have suffered, and are most interested in correcting it. It was stated at a meeting of the South Eastern Railway Company, in the month of March last, that the Parliamentary expenses of that Company during the last ten years, had amounted to the enormous sum of 479,711*l.*, being at the rate of 53,000*l.* a-year. These expenses, it was explained to the unfortunate shareholders, "had been quite unavoidable, owing to the bad system of railway legislation."^{*} It might have been further explained, for their comfort, that in return for this monstrous outlay they had obtained from Parliament the privilege of constructing the most tortuous and ill-contrived system of railway communication in the kingdom; for in the county of Kent every error and curiosity of Railway Legislation is exemplified, to the injury of the public, and the damage of shareholders.

Again, on the 6th of April, when Mr. Cardwell introduced his new Railway Bill, several of the leading speakers complained of the expenses and injury to which railways had been exposed by the system, or want of system, for which Parliament must be held responsible, and begged that if additional securities are to be provided for the public, the railways may at least be protected from the perpetuation of evils from which they have already suffered so much.

Mr. Cardwell is not likely to deny the justice of their complaints, for, as Chairman of the Committee of last Session, on Railway Legislation, the magnitude of these evils was forced upon his attention; and his able Reports leave nothing to be desired, — except a remedy. He has, indeed, attempted to improve the constitution of Railway Committees in the House of Commons; but his experiment has not been very successfully inaugurated, and has merely served to demonstrate the incurable infirmities of the system which he had hoped to reconstruct. So far, therefore, as railway interests are concerned, there cannot be a more favourable opportunity than the present, for ensuring to any suggestions of practical improvement a candid consideration. And the

^{*} "Times" Report, 17th March, 1854.

experience of the last fifteen years must have satisfied all persons concerned in other public works and improvements, that even when they have obtained from Parliament what they needed, they have secured it with the utmost difficulty, and at a disproportionate cost.

And while the public and the suitors are thus favourably disposed towards a change of system, members of Parliament are growing weary of their attendance upon Private Bill Committees, where little credit is to be gained, and much drudgery is inevitable. In 1845 Sir Robert Peel counselled the younger members to go and learn statesmanship in Railway Committees. This advice was received with some derision at the time; and, whether good or bad, has been neglected ever since. The members attend, it is true, because they cannot help themselves; but they are always ready with excuses. "We are willing to serve," they say, "but let it be later in the Session: it is not convenient now." Or, "we are quite ready, at once, but we cannot sit upon that great railway group, which will last a month, as we are shareholders in one of the rival lines." And this last excuse points to a growing evil. The capital invested in railways and other public undertakings is now so enormous, that probably three-fourths of the members are shareholders in some scheme or another, which is affected by Private Bill Legislation. It is therefore becoming daily more difficult to secure the services of disinterested Committeemen, and still more difficult to find men who are supposed to be impartial.

All these circumstances must force upon the attention of Parliament and the Government the necessity of devising an effectual remedy for evils, which are universally acknowledged, and which, if not corrected, will be a growing reproach to both. The remedy is to be found, as we believe, in Lord Brougham's resolutions, which we commend to the serious attention of every one concerned. They strike at once at the root of the evil, by proposing to discontinue altogether the present system of Parliamentary Committees, without impairing the legislative authority of Parliament. It is proposed to attain this important object by the constitution of a new tribunal, common to both Houses, which shall perform all

the functions of inquiry and judicial determination now entrusted to Committees.

If no other result were to be secured by this plan than the discontinuance of the separate inquiry which is carried on in either House, the advantage would be sufficient to recommend its adoption. Every matter is now required to be proved twice over, — once in the Commons and once in the Lords. When the promoters of a Bill have at length triumphed over every opposition in one House, they have to pass through the same ordeal in the other. Nor is this by way of appeal to a superior tribunal, in exceptional cases of error and injustice. Each inquiry is independent of the other; the same issues of fact are tried twice over, and even the most formal proofs are given a second time, with as much minuteness as if they had never been offered before. Perhaps the best example of these truly absurd and vexatious proceedings is to be found in the proof of Standing Orders. Since 1847 the Standing Orders of the two Houses have been almost identically the same, and yet compliance with them is invariably proved twice over, as if each House were determined to ignore the existence of the other. And while the Commons permit many formal matters to be proved by affidavit, the Lords reject such evidence altogether, and require the personal attendance of every witness from England, Scotland, and Ireland to be sworn at their bar.

In order to avoid these double inquiries, it has been suggested that Bills might be submitted to joint committees of Lords and Commons; but there are insuperable obstacles to such an experiment, in the dignity, the privileges, the jealousy, and the proceedings of the two Houses. By Lord Brougham's plan, all these obstacles would be at once overcome. By the independent orders of each House, the Court would inquire into the merits of every Private Bill: its reports would be made to both Houses independently, and the Bill would then pass through its several stages, like a public Bill, merely omitting the Committee. Each House would retain its independent legislative authority; but would delegate certain inquiries to a competent Court instead of to incompetent Committees.

But there are even greater evils than the double inquiry, which would be corrected by this plan. Under the present system there is so much of chance, and so little of consistent principle, that litigation is directly encouraged. It is impossible to predict the result of any application to Parliament, as it depends upon the particular committee to which its examination may be allotted. The most ruinous contests are thus excited, and are carried on in the most costly manner. Fifteen or twenty committees are sitting all at the same time, affirming one doctrine here, and denying it there; while counsel gifted with ubiquity, as well as other accomplishments, are gravely arguing both sides of every question, two or three times a day, before half a dozen-different Committees. But even their ubiquity is continually at fault; and if clients would reckon upon a single counsel, in time of need, they must retain at least three times as many as they want, for the proper conduct of their case. These are the abuses that have ruined railway companies,—hap-hazard legislation, devoid of principle and sound policy, and contests costing a thousand pounds a day.

Parliament has long been sensible of its own deficiencies, and has endeavoured to supply them by the aid of Government departments. It sought for help in Lord Dalhousie's Railway Board; but it was impossible to rely upon reports not founded upon evidence. It tried the Railway Commissioners, but gave them up in despair. It tried preliminary inquiries in the country, but found them worse than useless. In some cases it was wisely provided by general laws for matters which had previously been the subject of private Acts of Parliament. But still a mass of impracticable legislation presents itself, in dealing with which the present machinery is at once inadequate and mischievous.

Amidst so many failures, it is curious to observe that the only successful experiment was founded upon the same principle as that recommended by Lord Brougham, and introduced in the very year in which he propounded his plan. In 1846 the Commons discontinued the appointment of Committees for inquiry into compliance with their Standing Orders, and confided the very same duties to two Examiners.

These inquiries had previously engaged the services of forty or fifty of the most useful members of the House for two or three months of every Session. Yet their exertions failed in making the tribunal satisfactory, while the expenses to which the parties were exposed by delay, arrears, and the detention of witnesses were absolutely appalling. All these evils at once disappeared on the appointment of Examiners. The improved tribunal has now been in successful operation for eight years. It is no longer a novelty, and has worked so smoothly and steadily as scarcely to have attracted the attention it deserves. But it affords an encouraging precedent for the further changes which we have proposed. The railway interest have readily admitted the advantages of one improvement, and they have only to urge the adoption of the other, in order to secure its speedy introduction. The whole scheme has been carefully matured, and nothing is wanting but the *will* to give it a trial.

ART. XI. — TRANSFER OF LAND, WHAT IS NOW
TO BE DONE?

Report from the Select Committee on the Registration of Assurance Bill, with the Minutes of Evidence. 1853.

WE had only time in our last number to notice the appointment of the Registration of Title Commission. We need not tell our attentive readers that it has been one of our objects for many years to obtain "a commission for the purpose of considering the subject of Registration of Titles with reference to the sale and transfer of land," and here it is made to our hands.

And then who are the Commissioners Her Majesty calls them her "trusty and well-beloved;" but may we not also claim them for our councillors by the like terms, our trusty and well-beloved Richard Bethell, Solicitor-General, our trusty and well-beloved Thomas Emerson Headlam,

Henry Drummond, Vincent Scully, and Robert Wilson, not to mention others: surely if this question were to be committed to persons in whom, we may appeal to our past pages, we have reposed implicit confidence, it is in the present commissioners. We need not say, therefore, that we feel the greatest interest in the labours and success of this Commission, and will gladly assist it to the utmost of our ability.

It is with this view that we now wish to consider the present state of the important question referred to them, and what is now to be done.

This Commission owes its origin to the Select Committee on the Bill for the Registration of Assurances of last session, which recommended that that Bill should not be proceeded with; but, stating that a scheme for the Registration of Titles had been brought under their notice, suggested the immediate appointment of a Commission for the purpose of considering the subject of registration of titles, with reference to facilitating the sale and transfer of land, *in order that a Bill for effecting that object may be brought into Parliament at the commencement of next session.*

The Commission was, however, not appointed until the present year, and Easter has come to some without any announcement of any such Bill, and from all that we have heard of the proceedings of the Commission, the promised Bill is quite as far off as ever.

Indeed, however anxious we may be for a settlement of this question, this delay does not, under present circumstances, give us unqualified regret. Having attentively read the evidence taken by the Committee of last session, we have but faint hopes that the Commission will disembarass the "scheme" referred to them from the difficulties and perplexities with which it is now surrounded.

This plan resembles, in most respects, that of Mr. Robert Wilson, one of the Commissioners, and is familiar to our readers. As it owes some of its reputation to the exposition it has so often received in these pages, it is of some importance to state to what extent it has our approval. So far, then, as the scheme proposes to deal with the entire legal interest in land, to follow the analogy of the transfer

of stock in the funds, it is, in our opinion, founded on a true principle, which has not only been acted on to an immense extent, as well in this last kind of property, and in shares in railway and other companies, but also in many large tracts of lands, especially in the North of England held under manors. But beyond this, we are not prepared to follow Mr. Wilson, and still less the gentlemen who have more recently advocated a similar plan with large additions of their own. To the simple idea advocated by us, a machinery has been added of certificates and distringas of a very complicated character, to which we must decline giving our adhesion. And further, as we shall see, some ingenious persons, in attempting to support this scheme, have wished to alter the whole law of real property, to bring it within the forced rules of a new system, and instead of adapting their plan to the requirements of individuals, and the exigencies of society, would persuade us to make all these adapt themselves to the new system, and, if this is not possible, to abolish all estates when they interfere with their views. Instead, then, of altering as little as possible, especially in the first instance, they would sweep all away. This is as impolitic as it is impracticable.

Its promoters seem to be haunted, among other phantoms, with the bugbear of settlements, and insist on becoming their protectors, and with this view they propose to register all dealings with the equitable interest, thus introducing all the evils of registration of deeds which they condemn. So far as stock is concerned, the distringas has been provided by Courts of Equity as a protection, and has proved an efficient one; but it is open to grave doubts whether we should build up a system of this kind beforehand. So as to certificates of titles, it may turn out that these documents, when a system of registration is in operation, may be highly useful; but it is not necessary, in our view, to enter into that part of the subject at the present stage of the question. We want to see a cheap and simple transfer of land provided for, and we think it is premature to consider details of this nature at the present time.

We retain, on the whole, our faith, not, we admit, without

some serious misgivings, in the recommendation of Mr. Wells, as already stated, and which principle was clearly explained by Mr. Cookson in his paper as already printed in the "Law Review;" but this principle has not only not been helped, but has in our opinion been greatly embarrassed and entangled by the evidence intended to be corroborative of it by Mr. Cookson, Mr. Field, and Mr. Williams before the Committee of last Session.

We are prepared to take the step of the Registration of Ownership, and to establish some machinery for this purpose, as we have very recently explained. This would be in many ways a useful proceeding in the right direction, and quite practical.

Further than this we cannot go. Of this elaborateness of useless detail, as it appears to us, given in the evidence, we must content ourselves with one or two specimens.

Mr. Williams having stated (II. 351.), as to the plan before the Committee, that "if you look into the interpretation clause, you will find that leaseholds are to include leaseholds for lives," Mr. Walpole asks him, "What will you gain by having a *freehold* for lives included under your term *leasehold* for lives?" Mr. Williams boldly says, "A lease for life is a freehold, but it still properly falls under the head of a lease," and is therefore to be called a leasehold!

But a little further a more comprehensive view still is taken, in which Mr. Williams conditionally spares for a time estates in dower and curtesy.

Mr. Headlam asks him, "You do not consider that any alteration in the law, any alteration in the nature of estates, any alteration upon the charge, any alteration in the devolution from the ancestor to the heir, or any alteration in the law of real property of that description, is necessary *previous to your scheme* being enacted?" Mr. Williams answers, "Except, perhaps, with reference to dower and curtesy, which it *has been suggested would be very inconvenient to retain, although* I am not prepared to negative them."

And thus it appears in other parts of the evidence of that gentleman, that it is proposed in every respect to alter the law, and to fetter the right of alienation, not because the law

is bad; or that the right of alienation is inconvenient, but because the established rules are unsuited to the working of the plan proposed, — propositions, as we must be allowed to call them, so absurd, that we do not think it necessary further to discuss them.

We have said that we are prepared for the step of *Registration of Ownership*. The whole of the evidence taken by the Committee has also greatly confirmed a principle of the utmost importance, for which we have long contended, and which, if properly developed, we believe will prove to be the point on which the whole question, so far as past titles are concerned, now turns. We mean the principle of insurance of title. We shall collect some of the opinions as to this.

In the first place, it appears from Mr. Cookson's evidence, that the present Solicitor-General (II. 206.) suggested this as a part of the proposed plan, and that Mr. Cookson then adopted it.

Mr. Field thus alludes to it: —

" 253. Mr. *Lowe*.] You were speaking of a system of warranted titles; will you explain what you mean? — You have not gone into that question at all; I should adopt what was proposed by the plan; Mr. Cookson's evidence is elaborate; it is really what may be called the principle of the Encumbered Estates Act; a minute investigation by a Government official, by the registrar, or some one else, of any titles that were brought to him, at the expense of the party bringing them; a system of advertisement or notice, to be made as extensive as possible to all those who can claim rights as against the property under consideration, and after that a transfer, with a warranty by the vendor of the validity of the title, subject, possibly, to a short term or statute of limitation. I believe that that can be done with perfect safety to the public, at no great charge beyond the mere expense of counsel, solicitors, and so on; I believe that any little charge beyond that would be an ample insurance to the public for running the risk of indemnifying all parties who might be dispossessed. Experience shows there would be very few cases in which such a thing would arise. I believe a system of warranted titles might be carried out with very great benefit, and for all building purposes, all land companies, or any building societies, would be brought in under that system.

" 254. Therefore when land with a warranted title had once

been put upon the register, every transaction afterwards would follow in the course proposed by Mr. Cookson?—Yes. In the other case they would be warranted after they are once put on the register.

“255. *Mr. Walpole.*] If the titles fail, the Consolidated Fund makes good the loss?—Certainly.

“256. *Mr. V. Scully.*] Would you propose a small charge to be made to persons getting the benefit of this Parliamentary title?—Yes.

“257. More than sufficient to indemnify the public funds from any risk?—Yes; I believe the risk to be extremely small; there are not many titles so bad after all, that ejectments follow on them; though there are very few in which conveyancers will not start an infinite number of little difficulties and queries. The sweeping up of their cobwebs is a most expensive process.”

Mr. Butler gives some valuable testimony as to this principle.

“868. *Mr. Walpole.*] Do you propose, under your system, to warrant the title?—Yes; and I do not think that any voluntary, and you could scarcely have an avowedly compulsory system of registration, would be more than a dead letter without it. You have the great advantage of precedent and experience in its favour; and it would offer the temptation of an immediate benefit to induce landowners to register. A really voluntary system, without an adequate temptation to make use of it, would be a practical absurdity.

“869. When would you give the warranty, and what would be the nature of the warranty given?—The warranty would be of the same sort as is now given by the Government, that is by the Nation, when you buy any land which at present belongs to the Board of Ordnance. If you buy the site of an old barrack it is conveyed to you by the principal officers of the Ordnance, and that gives you a Parliamentary title against all the world. Then that would get rid of the disadvantage of having frequently to investigate the prior title. The investigation by the registrar, who would ascertain the exact property to be warranted and the persons entitled to it, would be once for all.

“870. Then would your warranty be an absolute warranty?—An absolute warranty against everything except specific incumbrances agreed on; for instance, a piece of land subject to a chief

rent of 20*l.* a year, you would have warranted subject to that chief rent."

"873. *Mr. Solicitor-General.*] You mean by warranted, that the guarantee shall be secure of the ownership of the land, not that he shall have a claim on the fund which is to be the insurance fund of the title?—No, he shall be warranted the possession of the land. The registrar, representing the nation, should pay any person whose interest had not been compensated for, full compensation, when he made out his claim.

"874. Then adverse claims of ownership are to be compensated out of that fund, but the property specifically is to go in conformity with the warranty?—Yes."

But perhaps Mr. Coulson's opinion on the subject is of the greatest value. He was, as our readers well know, one of the former Real Property Commissioners; and the whole subject was brought before that Commission by Mr. James Stewart, but the Commissioners expressed no opinion respecting it. Mr. Coulson, however, we presume, was of opinion that it might have been adopted with advantage, and he goes further than Mr. Bullar, because with his well known candour he says, insurance is applicable not merely to the scheme before the Committee, but to the existing practice of dealing with titles.

"995. Mr. Bullar stated yesterday in his evidence, that he thought this system, to be really valuable, should proceed to the warranty of title; now, you have not said anything on that point. That brings us to the exact point where you left off in your last answer; now, what do you think about the suggestion as to the warranty of title?—I think the warranty of title would be, in some cases, valuable; I do not at present see why, as far as it is valuable, it should be confined to this case of registered ownership; it is only to give some premium to register ownership.

"996. *Mr. Walpole.*] To induce parties to come in?—Yes; I see no reason for mixing up the warranty with the consideration of the registered title. If persons are desirous of having their estates warranted, it may be a very good thing.

"997. It will give great facility for the sale of property in the course of time?—At present it would give very great facility undoubtedly. There is very great difficulty in working out any scheme of warranty, because as it stands the warranty of course must be subject to a great number of those circumstances which

occasion litigation really on the sale of estates. A very large proportion of the litigation on the sale of estates does not arise from what may be called properly title. There are possessory rights; no warranty would ever extend to the possessory rights, and rights of way, and the like, which form a very considerable portion of the causes of litigation; but still warranty no doubt would be of great importance for facilitating the sale of estates.

"998. *Chairman.*] But you say that the warranty might apply to all estates; how can you obtain warranty without some machinery for granting this warranty?—You must have an ascertainment of the thing granted; the warranty would amount to this: it would be like a sale, or something better than a sale at present, under the Encumbered Estates Commission in Ireland.

"999. *Mr. Walpole.*] It would be very similar?—Very much the same thing; you must ascertain the subject-matter. It seems to me one of the great defects throughout this plan, that it has not proceeded on any machinery for the ascertainment of the subject-matter."

And no doubt, as Mr. Coulson says, and we suppose all will admit, some machinery would be essential for carrying through any plan for the Insurance of Titles, and here Mr. Vincent Scully's Land Tribunal would come into use.

We venture, then, to call the special attention of the new Commission to the subject of Insurance of Titles, or, as it has been recently called, Warranty of Titles, as we believe that the right and complete settlement of the question of a Registration of Titles in England depends mainly on a full development of this principle. We are gratified to find that, since it was first brought forward in these pages by a reprint of the Report of the Law Amendment Society, it has gradually gained ground, and may now be considered to be a recognised mode of dealing with the subject before the Committee. We are satisfied that the more it is investigated the more complete will be its triumph. We observe that Mr. Browne has made it the subject of a pamphlet; but this does not appear to have added anything new to the discussion of the principle, except, that he says that Lord St. Leonards (he does not mention on what occasion) recently stated in the House of Lords, that if

the usual examination of titles had taken place, and the title was approved, he would warrant the title for five shillings.

All, then, that can now be done appears to us to be:—

1. Registration of Ownership.
2. Insuring of Past Titles by the State.

These would require a strong Government to carry, and the Law officers of the Government to be in earnest; but, if properly worked and developed, these two principles would set free nine-tenths of the whole land of the country, and to this extent effect its cheap and easy transfer.

ART. XII.—BANKRUPTCY COMMISSION.

ONE of the Chancellor's Commissions has resulted in a very practical Report. It is of so much importance to the commercial public, as well as to the law reformer, and contains so many points of great interest, that we have thought it expedient to give a very full abstract of its contents. The instalment of reform recommended by the Commissioners is very large. It being well and clearly worked out, the Chancellor will probably be enabled to realise it in the course of the present Session. The Commission has certainly not been wanting in activity, nor, as we think, in practical wisdom.

The Report, after reciting the Commission, and stating the mode and extent of the investigation which the Commissioners conducted, treats of the several topics of inquiry suggested by the Commission, arranged under the following heads, which are expressed in the language of that instrument:—

1st. The cause of the diminution of the fees and funds now by law applicable to the payment of the expenses of the Court of Bankruptcy.

2ndly. Since it appears that these funds are insufficient to discharge the expenses, whether such deficiency is likely to be permanent.

3rdly. Having regard to the quantity of business trans-

acted by the Courts of Bankruptcy, whether any and what reduction of the establishments of those Courts, either in London or the country, can safely and properly be made, or whether any and what other measures can be adopted for meeting their expenses.

4thly. Whether any and what more effectual means can be adopted for obtaining a more efficient check on the accounts of the official assignees, and for preventing the misapplication by them of the funds coming to their hands.

5thly. Whether the alteration of the Bankrupt Law made by the Act of 1849, establishing class certificates, has or has not been productive of benefit.

6thly. Whether, with the view of obtaining uniformity of practice as to the granting of such certificates, or for any other reason, any and what alteration of the present enactment would be desirable; and

7thly. Whether in any and what other particulars the Bankrupt Law, as it now exists under the Act of 1849, requires amendment.

Taking these subjects in order, the Report sets forth a tabular statement of the surplus and deficit of the revenue of the Court, year by year, in two periods, the first from the establishment of the country District Courts in 1842 to the Act of 1849, and the second during the operation of that Act.

In the former period the revenue, though fluctuating, yet on the whole produced a surplus of 11,000*l.*; but since the Act of 1849 there has been a continuous deficiency, amounting in 1853 to 18,142*l.* 8*s.* 2*d.*, and in the four years to 51,706*l.* 2*s.* 5*d.*

After explaining the present financial position of the Court, it proceeds to treat of the causes of the deficiency of the revenue under the Act of 1849, namely, the alteration thereby made in the mode of raising the revenue by the introduction of a system of per-centages on assets (afterwards particularly adverted to), and the diminution of the business of the Court.

In the four years immediately preceding the Act of 1849 there was issued 6863 fiats, or, on an average, 1715 yearly;

while in the last four years the petitions have been only 3678, or, on an average, 919 yearly. In the latter case, however, the petitions for "Arrangement under the control of the Court," are to be taken into account, of which there were 237, or, on an average, 61 yearly.

The causes of this diminution of business are then considered, and are stated to be, according to the evidence, as follows: —

1st. The general prosperity of trade and commerce which has recently prevailed.

2ndly. A better and more prudent system of trading among the smaller traders, which some witnesses attribute partly to the stricter provisions of the Bankrupt Law Consolidation Act, and partly to the operation of the County Courts, in shortening the terms of credit, and facilitating the recovery of debts.

3rdly. The effect of the proviso in the ninety-third section of the Consolidation Act, which precludes a trader from obtaining adjudication of bankruptcy against himself, unless he can show that his available estate is sufficient to pay his creditors at least 5s. in the pound clear of all charges.

4thly. The great expensiveness of the system in the fees and per-centages charged against the estate, which induces all parties to prefer a settlement out of Court by composition or other arrangement, especially as greater validity has been given to such settlements by the recent statute.

5thly. The severity of the penal clauses, which drives many debtors to make such settlements with the assistance of friends, and disinclines many creditors from proceeding in bankruptcy; and

6thly. An unwillingness on the part of creditors to encounter the publicity and formality of proceeding, which operate, to a certain extent, as a partial exposure of their own affairs, and also as an impediment to the adjustment of the claims of themselves and others in the way which they conceive to be most conducive to their own interests.

The last four causes are then examined in detail, the first two being passed over with the observation that the contemporaneous diminution in the number of arrangements out

of Court (according to the statistics in the Appendix) tends to show that causes independent of the state of the Law of Bankruptcy and its administration have contributed to lessen the business of the Court.

The restriction on the petitions of traders themselves for adjudication of bankruptcy first comes to be considered. The statistics set forth in the Report show the disproportionate decrease of voluntary bankruptcies, for while the number of petitions presented by creditors in the four years since the Act of 1849 falls short of the number of those in the immediately preceding four years by 19 only, the cases in which the trader himself was the applicant were reduced from 3,510 to 344; the difference of which represents upwards of 99 per cent. of the entire amount of diminution in the business of the Court.

The circumstances attending the operation of this provision are then examined, and the conclusion is arrived at that it has failed to accomplish the objects desired; has been alike prejudicial to the debtor and the creditor; operates injuriously to the honest trader; and opens for the dishonest a door to fraud and evasion.

The recommendation of the Commissioners therefore is that it be repealed, and that a trader be allowed to obtain adjudication of bankruptcy in his own case on showing assets to the amount of 150*l*.—a sum sufficient to provide for the expenses of the Court, and to afford his creditors means for conducting a scrutiny of his conduct.

The expensiveness of the Court system next comes under review, as one of the causes of the diminution of business. The Report enumerates the various fees, allowances to officers, and per-centages now payable under a bankruptcy; and after citing from the evidence an example of comparative cheapness of administration under the new arrangements of the Court of Chancery, points out the variety of authorities by which the fees and per-centages in Bankruptcy are regulated, and recommends that they be placed under the direction of a definite number of London and Country Commissioners, with the approbation of the Lord Chancellor, a limit being fixed, not to be exceeded in any bankruptcy; so that, for instance,

more than 30%, should not be taken as Court fees in any case, and that the fees be revised and reduced from time to time as the revenue will admit. Especial attention is directed to the burdensome character of the per-centage payable to the Chief Registrar's account, which is peculiarly oppressive on large estates, and tends therefore to keep them out of Court.

The expense of the allowance for the preparation of the bankrupt's balance-sheet is then adverted to, and it is recommended that, as a general rule, the bankrupt should make out his accounts for himself, and that a simpler form of balance-sheet for ordinary bankruptcies, and such as any man who has carried on trade should be able to furnish for the information of his creditors, be prepared and issued by the Commissioners.

The severity of the penal provisions of the Act is then treated of as one cause of the diminution of business. The Report states fully the nature and scope of the present enactments respecting protection; and the certificate, and, after pointing out the unnecessary harshness of many of them, recommends various modifications, all tending to diminish the rigour of the law, and to clothe the Commissioner who may have to adjudicate in any particular case with a discretionary authority. The novel provisions of the Act of 1849, which enable a creditor who has proved under the bankruptcy to take in execution the person of a bankrupt to whom the Commissioner has for any reason refused protection, it is recommended, should be repealed, as impolitic and mischievous.

On this part of the subject it appears, from the Report, that there is not a unanimity of opinion among the Commissioners, as some would go further in the direction of mitigation of the law, holding that protection should be invariably given to the bankrupt up to the adjudication on the question of the certificate, and that defined legal offences should be punished only after trial by jury before the regularly constituted Courts of penal judicature, so that a certificate should never be refused upon the ground of imputations too vague and undefined to be the subject of criminal procedure, and established only by the opinion of an administrative

tribunal, which is not a satisfactory substitute for the verdict of a jury and the sentence of a Judge.

The publicity and formality of proceeding in the Court, stated to be causes of the diminution of its business, are then examined. The former, it is observed, will be sufficiently obviated by the more general adoption of the means provided by the existing law for the reception of proof of debts by affidavit, and the latter by the transaction of portions of the purely administrative business of the Court before the Commissioners in chambers, a practice which might advantageously be introduced.

The Report proceeds to state that the inconveniences before-mentioned have led to the popularity of the provisions of the Act of 1849 relating to arrangements by deed, which were intended to enable a majority of six-sevenths of the creditors of a trader to bind the minority with respect to the mode of liquidation of his debts. The defects of these provisions are then pointed out, being principally the insufficient arrangements respecting the notices to be given to the creditors, and the exclusion from the operation of these sections by the decisions of the Courts of Law of all deeds which do not provide for the distribution of the entire estate of the trader for the payment of his debts. To remedy these defects a series of provisions is proposed, comprising within their scope every arrangement by deed of whatsoever nature, — requiring the deed to be registered in the Court of Bankruptcy, and to be gazetted, — allowing a limited time for execution of the deed, — making the certificate of the Court of Bankruptcy conclusive evidence, in favour of the majority, of the fact of the requisite proportion of creditors having executed the deed, — and giving the parties full power to stipulate by the deed for leave to obtain the assistance of the Court in protecting the property, executing the trusts, taxing costs, &c., &c.

Corresponding amendments are recommended in the provisions respecting “arrangements under the control of the Court,” and it is proposed that in the former, as well as in the latter class of cases, due contribution should be made to

the support of the Court by the parties availing themselves of its aid.

After observing under the second head of inquiry that the present inadequacy of the funds of the Court is likely to be permanent if the existing system be continued, the Commissioners proceed to consider, under the third head, the reduction of the establishment and of the expenses of the Court. The Report states the number of the officers of the Court and also the amount of its expenses (exclusive of the remuneration of officers not paid by salary), which in 1853 amounted in the whole to 90,000*l.*, and then goes on to an examination of the several particulars which make up this sum.

The Commissioners recommend that an endeavour should be made to procure the discontinuance of the per-centage paid to the Bank of England for acting as the banker of the Court, which has varied from 3000*l.* to 1800*l.* per annum, or a commutation of the per-centage into a fixed annual payment of considerably lower amount; and they submit that, in the event of terms more favourable to the Court not being obtained, the matter might advantageously be considered by the Government on the next occasion of a legislative adjustment of the privileges of the Bank.

The compensations for abolished offices, the payments under which head amounted in 1853 to £21,565 4*s.* 7*d.*, the Commissioners recommend should be transferred to the Consolidated Fund, on the ground that the burden produced by extensive alterations made in the law for the public benefit should not be thrown on the suitor, especially where the funds of the Court are deficient.

The Report states that the London Commissioners are by statute to be reduced to four, and the London Registrars, including the Chief Registrar, to six, as vacancies occur; and that the Court being required to be open daily, and the business being likely to be increased, the staff thus reduced may not be too large, but recommends the reduction on future appointments of the salaries of the London Registrars from 1000*l.* to 800*l.*, in accordance with a Report of a Select

Committee of the House of Commons in 1850, and a similar reduction in the salaries of the Country Registrars.

It then recommends that the Lord Chancellor should be empowered to reduce the number of Country Commissioners from twelve to seven, upon the occurrence of vacancies, and according to the state of the business, and to appoint from time to time a deputy, who should be remunerated out of the funds of the Court, to supply the place of any Commissioner in his illness, or necessary absence, or during a vacation. The registrars and ushers would be correspondingly reduced. The amount of the prospective saving to be effected is estimated at 18,100*l.* per annum, while if increased business should require the continuance of the present establishment, the revenues of the Court will also be augmented.

The Commissioners are of opinion, that it is not desirable that the office of the Accountant in Bankruptcy should be discontinued, as had been suggested to them, but recommend the revision of the system of accounts, and the reduction of the number of the clerks, as the business may permit.

It is then recommended that the Official Assignees be reduced from twenty-two to fourteen at the most; and that modifications be introduced in the arrangements respecting their remuneration, by the division of the bankruptcies to be allotted among them into classes, according to their probable value, by an increased allowance for the collection of very small debts, and for an early dividend.

The Report then proposes that the duties of the brokers should, when required at all, be discharged by the Messengers; that the allowances of the latter officers should be much reduced, that they should give security, and on future appointments be paid by salary.

And after stating the existing checks and regulations respecting the accounts of the Official Assignees, which forms the fourth head of inquiry, the Report recommends the adoption of certain improved rules respecting audits and dividend meetings, the effect of which is intended to be to induce the creditors' assignee and the bankrupt himself to exercise a more active superintendence over the accounts of the estate rendered to the Court by the Official Assignee.

It is also recommended that, as in Ireland, the security of a guarantee society may be taken for an Official Assignee, and that the various regulations respecting the keeping and auditing of the Official Assignee's accounts should receive legislative sanction, instead of resting merely upon the authority of the general rules and orders of the Court.

On the subject of the classification of certificates, which forms the fifth head of inquiry, the Commissioners state, that in the country the classes seem to be less regarded than in London; that in both there is a considerable difference of opinion respecting their value; and that accordingly it is necessary to examine the grounds and reasons of the contradictory conclusions. Having then stated fully the leading arguments on each side of this question, the Commissioners observe, that it cannot be denied that there is considerable force in both these views; but they rest so much on the opinions of witnesses rather than on facts adduced in evidence, that the Commissioners are unable to state whether the system of classification has or has not been productive of benefit. Both as regards the past and the future the Commissioners state that they have failed to arrive at any definite conclusion; and they regret to say that, after great deliberation, they are still divided in opinion. Some of the Commissioners think that the system of classification should be abolished altogether; whilst others are of opinion that to a certain extent it ought still to be continued, provided it can be cleared of the vagueness and uncertainty which appear to have produced, under similar circumstances, very different decisions. They are all agreed, however, that the law as it stands is so vague and ill defined that it cannot be administered with justice or precision.

This leads the Commissioners to the sixth head of inquiry, viz., whether, with the view of obtaining uniformity of practice, or for any other reason, any alteration of the present enactment would be desirable.

To that question, the Report proceeds, there can be but one answer—some alteration is clearly required.

It then states and examines the various alterations suggested; and after repeating that some of the Commissioners

would object to classification, in whichever way the system might be modified, since such modification can only be regarded by them as a contrivance for abolishing a simple certificate of conformity, or rendering it discreditable to the bankrupt and prejudicial to his future prospects, it concludes this part of the subject with the statement that those of the Commissioners who approve of some system of classification agree in the opinion that two classes will be preferable to three; the one for approval of the bankrupt's conduct as well as for his conformity to the law, and the other only for conformity, and with a detailed explanation of the mode in which this view should be carried into effect.

Under the seventh and last head of inquiry, whether in any and what other particulars the Bankrupt Law as it exists under the Act of 1849, requires amendment, the Commissioners, after observing that they have not felt themselves called upon by the terms of the Commission to enter upon an investigation of the fundamental doctrines of the Law of Bankruptcy as long established in this country, and that therefore their recommendations under this head will not affect the principles of the Law, proceed to make the following recommendations:—

That a check be provided upon bills of sale by requiring their registration.

That the time limited for disputing an adjudication of bankruptcy be extended from twenty-one days to two months.

That additional facilities be afforded for winding up the bankrupt's affairs with all convenient speed, but without a premature or forced sale of his effects, and for disposing of outstanding debts or property at any stage of the proceedings.

That declarations of insolvency be filed in the country District Courts.

That, with respect to keeping possession, the messenger be under the control of the Official Assignee (subject to the directions of the Court), previously to the choice of assignees.

That a distress levied after an act of bankruptcy be available for six months' rent only.

That a new table of costs be prepared.

That the power of taxing the bills of auctioneers, &c., taken away by the Act of 1849, be restored to the Court.

That the returns of financial and other statistics relating to the Court, now required to be made directly to Parliament, be made to the Chief Registrar, who should annually make a report to the Lord Chancellor, which should then be laid before Parliament; and

That the provisions of the Act of 1849 be carefully revised, with especial reference to the judicial decisions which have been given on the construction of its various parts.

And upon this the Commissioners observe, that the changes of language and substance which such a revision would show to be desirable, and those which their other recommendations involve, will, they apprehend, be so numerous and extensive, that it may be a question whether, notwithstanding its recent date, the consolidating statute should not be repealed and be re-enacted with the alterations. If this course be deemed expedient, it is added, the opportunity should be taken of incorporating such of the provisions of former Acts as still remain in force, and those of the subsequent statutes relating to the same subject.

On the subject of appeal the Report mentions the objections of expensiveness, and of new evidence being brought forward, which are made to the present arrangement, but states that the Commissioners cannot see any practicable mode of removing the objections without introducing other inconveniences, which would more than counterbalance the advantages to be derived from the change; recommending, however, the adoption of regulations for limiting the costs.

In addition to these improvements in the existing law, the Report recommends the extension of the jurisdiction of the Court to the administration of the estates of deceased traders, under such arrangements for the due distribution of their assets as Lord St. Leonards' Bill of the last Session proposed.

Another proposal of the same Bill for making the country District Courts auxiliary to the Court of Chancery, in taking accounts, examining witnesses, &c., it observes, is

well worth attending to, and proceeds to state that a further proposal for the extension of the jurisdiction of the Court had been brought before the Commissioners by one of their body. It contemplated the enlargement of the Court into a Court of General Administration, which, in addition to its present jurisdiction over the estates of living traders and charitable trusts, and its proposed jurisdiction over the estates of deceased traders, should likewise have jurisdiction over trust estates of small value, and should also be empowered, upon the submission of the parties, to wind up the affairs of partnerships, and to conduct arbitrations. The Report upon this point states that the Commissioners, considering the extensive nature of this proposal, as well as the terms of the Commission, refrained from investigating this important subject, but that they thought it right to make the paper detailing the proposal a part of their proceedings, and have accordingly included it among the documents appended to the Report.

The Report then recommends investigation respecting the advantages of the sub-division of some of the country districts, the Commissioners considering it to be doubtful whether the benefits are commensurate with the expense; and with respect to the London Court, urges its removal from Basinghall Street to any locality to which the Courts of Law and Equity may be transferred, as well on account of the insufficient accommodation afforded by the present building as of the advantages that would ensue from the presence of a more numerous Bar, the assembling of the official assignees under one roof, and other consequences of the change.

The Report proceeds to treat of the proposal for the abolition of the District Courts of Bankruptcy, and the transfer of their jurisdiction to the County Courts. Of this measure the Commissioners intimate their disapproval, not only on the ground of the burden of new compensations which would be thrown on the country, or else on the suitor, but also on account of the essential differences between the functions and characteristics of the two classes of Courts. A Court of Bankruptcy is a Court of Administration, necessarily stationary, and open from day to day, with an officer (the official

assignee) attached to it for the investigation of a bankrupt's books and papers, and of his affairs generally, and employed in duties which cannot be properly and efficiently discharged, except in a fixed office, and which may be advantageously executed in one locality as the centre of an extensive district. The characteristic of a County Court, on the other hand, is the exercise of the contentious jurisdiction; with a view to which it is properly made ambulatory, so as to decide each case as near as may be to the locality of the litigant parties. The ordinary business of a County Court does not require such services as those rendered by an Official Assignee, and therefore if such officers were retained, their remuneration must be derived exclusively from the Bankruptcy business of a single County Court district. In the result, the Commissioners express their fear that the office of official assignee could not be maintained, and that the pernicious local and personal influences, and other evils which the District Courts established in 1842 were specially designed to cure, would probably be again introduced. Finally, the Commissioners observe that while the County Courts have a jurisdiction limited in point of amount, and confined to particular classes of subjects, that of the District Courts of Bankruptcy is entirely unlimited.

The Report concludes by stating the two objects principally kept in view by the Commissioners in its preparation, viz., on the one, the facilitating, simplifying, and rendering less expensive of the proceedings in Bankruptcy, when the parties find it necessary to have recourse to the Court; and, on the other hand, when that necessity does not exist, the enabling them effectually to settle their claims and rights by deeds of composition and other arrangements, either altogether independently of the Court or under its superintendence and control.

ART. XIII.—THE LAWS OF WAR.

1. *The Laws of War affecting Commerce and Shipping.* By H. BYERLY THOMPSON, Esq., B.A. Second Edition. London: 1854.
2. *Order in Council of the 15th April, 1854.* London Gazette, 18th April, 1854.

THEY are strange laws which the very parties to a contest impose upon themselves and their antagonists, and modify and maintain by the force of their own arms. The sooner we are released from the fetters now placed upon our practical judgment by so irreconcilable a phraseology, the sooner we shall be enabled to reason and discourse safely and intelligibly upon the momentous subject suggested, but not described, by the title of this Article.

Forty years of peace has done more to advance all the interests and some of the arts of peace than had yet been effected in the whole course of time. The improvement in the means of intercourse and locomotion has enabled every maritime country, and every country in which desirable objects of interchange are produced, to establish its connections with every valuable customer—civilised, barbarian, or savage. The most active and enterprising nations have scarcely profited more by this than those communities who have passively allowed the benefit to be brought home and administered to them. Still the four or five nations in whom the energies of civilisation are most active have made the bonds of peace so strong and so many, both with each other and with the rest of the world, that some of them would suffer much less from a dismemberment of their own territory than from an interruption of intercourse with their old enemies. No community, at all entitled to be counted as one amongst civilised nations, but has now an interest in uninterrupted intercourse outside of its political boundary, which, in economical and moral importance, does not bear a comparison with home interests which at the beginning of this peace were

reckoned of paramount importance. To sacrifice or to jeopardise this intercourse by war would now be to incur an evil just as much the greater as is all the increase of intercourse by the peace.

If war has not changed its nature, still its policy is changed by all the difference in the effects which it must now produce. If we were so unfortunate as to be bound by those very laws of which in former wars we were the most vigilant and rigorous maintainers, we should be compelled, in the first place, to inflict the greatest amount of mischief on ourselves, the next greatest on our best friends, and very nearly the least on our declared enemy. Fortunately, we have nothing to consider but our own and our friends' greatest convenience, which have become one; and whatever be the doctrines of the learned on the laws of peace or the laws of war, we have, in this very fact, the best means of enforcing our practice and obedience to our view of expediency on our enemy himself. Plaintiff or defendant in this contest may make his practice for himself and change it; and so that he does it consistently with his own best interest, there is no code which will condemn him, and no tribunal, not even his adversary, but will give a verdict in his favour.

Putting out of question some purely conventional practices, which more concern the respective pretensions to precedence of certain crowned heads and their representatives in entering a room, or taking seat at a table, or in receiving and returning salutes, and the like ceremonial matters, which, for the most part, can only be determined by convention or precedent, the remaining part of the practices between nations in a state of peace, consists simply in a recognition by each nation of all the interests in every one of its subjects, whether abroad or at home, which the internal laws of that state recognise as the proper subject for their protection. All treaties have for their object, as a general rule, the securing to the subject of the one state the enjoyment at the hands of the subjects of the other of some interests which the laws of his own country secure to him. All the objects of the intercourse of the subjects of different nations are to advance the very same interests as by the like

intercourse are advanced at home. All the extensions of international relations by diplomatic agency have for their object the reciprocal concession of protections to the subjects of each; so as *pro tanto* to give to them in another country the benefits of the laws of that country. In other words, the operation of amicable diplomacy is to give more or less of a common protection to the interests of the subjects of both countries, and, so far as this is effective, to enlarge the territory in which every man may pursue his interests under the protection of the laws of the place, and thus far to give him a larger common country for the prosecution of his objects.

In the realisation of this policy of peace England, and the United States have outstripped all other nations, in so far as they have most nearly approached the point of conferring on every friendly alien the rights of native subjects, and have often conferred on resident foreigners more extensive liberties and protections than they had in their own less favoured native homes; and either country is now as open to them and their enterprise as it is to its own subjects.

But it is more especially by our last intercommunication to the subjects of all nations of equal freedom of trade with our own subjects, that this policy has been carried out to that full extent which has necessitated an entire change in that system and practice of maritime warfare, which, till this time, had been insisted on by this country more tenaciously than any other, as a part of the so-called Law of Nations. We have by our altered internal policy made the people of every country, with which intercourse is beneficial, not our customers only, but we have made those who were formerly most our rivals now the most contributory, the most necessary, to our welfare. Those mercantile navies of other countries which it was once our policy, as much in peace as in war, to cramp, cripple, and destroy, are now necessary to supply the deficiency of our own, in meeting the incessantly growing demands of our home, our colonial, and our foreign intercourse. A French, or Dutch, or Danish, or Swedish, or Russian ship does us as good service as an English one, and the rate of freight we pay for it proves that it does a more valuable service than an English one did under our old policy.

A Russian province, most accessible to our commerce in peace, and to our arms in war, has become more contributory to our subsistence, more contributory even to our naval efficiency, than it is to the rest of that very empire of which it forms more a territorial than a moral part. We can scarcely reach our enemy but in a part where, if we warred on the population and property of the district, we should intercept our own advantage as much or more than his.

Our practical statesmen have not failed to see the bearing of these facts, nor to act decisively on their just impression. For two hundred years we had exasperated our prescriptive enemies till we made them irreconcilable, and disgusted our best friends, and alienated our oldest and safest allies, by our pretensions to enforce, in all their rigour, the so-called rights of belligerents, as deduced from the principles of professional publicists. From the principle that national war involves every subject and all the property of every subject of the belligerent nations, was deduced the conclusion that we might imprison those subjects and seize that property to our use wherever we found it; that we might seize that property though in a friend's ship. From the same principle that every subject of the one State is the enemy of every subject of the other, was deduced the duty and the justification of acts of individual hostility and the practice of privateering at sea; and this was extended by commission to persons not the subjects of the belligerent State, on the same grounds that had justified the like commission to mercenary adventurers of whatsoever country on land. Such practical deductions from abstract doctrines were, it is probable, never really beneficial to the nations which adopted them. Applied against friends they converted them into concealed or declared enemies; they raised formidable opposition amongst those who sincerely desired to observe a real neutrality, and gave unanswerable arguments for such armed neutrality as operated in fact to counterbalance and neutralise our own warlike power. They were probably never advantageous on the whole, even when successfully advanced and maintained; for although they satisfied the first craving of our ambition in restraining the progress of every other mercantile navy, and

in giving us a temporary maritime monopoly, this monopoly itself was a mere shipowner's advantage, and was the disadvantage of every other person who paid the monopoly price of freight and had to forego every thing which the monopolist could not carry. However this may have been, it is now seen to be no longer desirable, either to seek the means or to risk the end in the present stage of the war in which we are now engaged. We have waived what was called the right to seize enemy's property in friends' or neutrals' ships. We have waived the asserted right to confiscate a neutral's property aboard an enemy's ship. We have for the present announced the intention to abstain from issuing letters of marque. We implicitly abjure the old pretension to enforce the observance of virtual blockade, and we confine our pretensions to the simple seizure of enemy's ships and enemy's goods in enemy's ships, of contraband of war wherever found, and to the enforcement of such blockades only as are effectually maintained by an adequate present force.¹

The terms in which those ancient pretensions are abandoned, affect the style of a temporary waiver, for the occasion and under present circumstances, of incontestible rights. But we have the assurance that the seeming waiver is a final abandonment of pretensions, which can never again be enforced, but to the now manifest and incontestible damage of the nation which should be so infatuated as to make the attempt.

But the question most proper for the consideration of our readers is this — is not this new practice now announced for present and temporary use grounded on the true principles which should govern the modern practice of maritime war? and this not in the shape of a temporary concession or a voluntary waiver of a right to enforce the contrary practice, but as substantially and of itself the just and rightful use of naval force?

To dispose of this question, we must abandon some abstract doctrines and must examine and admit existing facts.

The Laws of Nations, especially the Laws of War, have

¹ Order in Council, 15th April, 1854.

been long diverging from the very simplest practices into the most discordant doctrines. Our so-called right to seize every person and all the goods of every person of the hostile nation has, in war on land, ceased in Europe since the Norman invasion, and has been abandoned by all Europeans even in their wars with savages, for many generations. We have retained, and we do still retain, the pretension to seize the person and the property of subjects of the enemy at sea, though engaged in the peaceful operations of commerce with ourselves or our friends. We maintain at sea the practice which has been abandoned on land for 800 years. We have still the laws of War of the Normans and Danes operative on the sea; and the doctrines and principles which it is necessary to maintain to justify our maritime practice would equally justify in war by land the capture of every peaceful labourer of the invaded country, the dispossession of every proprietor, and the conversion into prize of every penny and every article of property of the whole population of the territory we occupy.

The ancient simple practice was intelligible and consistent. War involved the dispossession of a whole population of its lands, its goods, the reduction to slavery of all who could be seized, and the investment of the invader with all that the invaded lost. War was then in fact, and not by implication, the war of every man of the one community with every man of the other who came within his reach; and it did as a fact, and not as a fiction, put the vanquished, in person and property, at the disposal of the victor. In such a contest, every one was not merely politically an enemy—he had to defend his own life, liberty, kindred, and goods by his own effort, and was a traitor to himself, his kindred, and his country if he did in person not do his best to destroy or disable every enemy who came within his reach. In such a state of things every man was a soldier, and subject in all his person and property to the burdens of service in war, and the casualties of success or failure.

But what was fact then is only now a figment of the publicists. Government and war are both carried on representatively and vicariously. Our paid civil servant does the work which five

hundred subjects formerly did in person ; our paid soldier does the work and incurs most of the dangers of war, and leaves a hundred men to their peaceful business. The business of war is no longer the business of the subjects, except in maintaining it by contributions, and for political purposes. The stake is now these contributions and these political objects ; and not the whole body and goods of every man. Defeat involves perhaps a greater contribution, and the greater or lesser failure of these political objects. Even conquest does not displace one proprietor and replace him by another, it only displaces one government and replaces it by another. Practically, then, the game of war, as it can be contemplated by civilised countries, is no longer a cast for life, liberty, the hearth, the altar, wife and child, and worldly goods : it is now only a contest for political ends, involving only political consequences.

Being thus narrowed as to its purpose and its ultimate effects—being thus for the most part prosecuted by special and appropriate political and military agencies, it is to invest a humane practice with a frightful doctrine to represent war as being essentially and as a matter of principle, such a relation of nations and men as it once was in fact, but as it has for the most part ceased to be. Granting that it might by possibility be again carried out to all the frightful extent that it once was, it is dangerous to make an extreme phenomenon the exemplar on which you found your definition, and from which you deduce your consequences theoretical or practical ; and an example will be seen of this danger in the comparatively barbarous state of our practice in maritime war fully justified by the publicists' definitions and general doctrines of war, but wholly repudiated in the practice of civilised war on land, and now all but abandoned, even as a pretension, by the enlightened men whose unfortunate lot it has been to see the beginning of another war, but who have done more even in beginning a war than could commonly be done by statesmen in a prosperous peace. For they have removed, as we believe for ever, the most fruitful cause of dispute of recent times ; they have made it possible hereafter for all maritime nations to pursue their commerce without resort

ing to open war of self-defence, or the scarcely less mischievous state of armed neutrality, which was happily described as war in disguise; and they have, to all appearance, secured to us, and to all the nations of Europe, and of the world, during the prosecution of war, more of the benefits of commerce and communication than existed under the restrictions of the Navigation Laws, even in the state of the most profound and cordial peace.

What remains is, that our expositors of the rules of maritime warfare, and our Judges, who will have to apply those rules to practice, may deal as boldly with the fictitious and adventitious doctrines prevalent under the name of the laws of war, as our statesmen have with the prescriptive but mischievous policy which had a twin birth and a conjoined development with them.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST FEBRUARY, 1854.

POINTS DETERMINED IN THE COURT OF CHANCERY.

COURTS.	REPORTERS.
Master of the Rolls - - -	16 Beav. Part 1.
V.C. Kindersley - - -	2 Drew. Part 2.
V.C. Stuart - - -	1 & Giff. Part 1. Vol. ii. part 1.
V.C. Wood - - -	1 Kay. Parts 3, 4, & 5.
Lord Chancellors of Ireland (The Right Hon. Mazieré Brady, The Right Hon. Francis Blackburne) ¹ -	9 to 18 Ir. Eq. Rep. 1 & 2 Ir. Ch. Rep., and Vol. iii. part 1.

POINTS DETERMINED IN THE COURT OF CHANCERY.

1. Charity — Election of Clergyman — *Cæteris Paribus* — Construction of — Injunction to restrain Clergyman improperly elected taking Possession of Living. 2. Domicil — by Birth — New, how acquired — Anglo-Indian — Where Persons have Residences in different Countries. 3. Election — Power of Appointment. 4. Husband and Wife — Separation Deed — Injunction to restrain Husband from violating Provisions of. 5. Husband and Wife — Mortgage of Wife's Leaseholds by Husband — Equity to a Settlement. 6. Husband and Wife — Separation Deed. 7. Misrepresentations — When Proceedings in consequence of, should be taken at Law — When in Equity. 8. Mortgagor and Mortgagee — Pulse Mortgagee offering to pay off first Mortgagee — First Mortgagee restrained from selling under Power. 9. Nun — On Profession does not become *civilitur mortua*. 10. Nun — Assignment by, to Convent — Bill to enforce, dismissed with Costs — Issue to try whether Deed duly executed

¹ A few of the most interesting points decided in the Irish Courts of Chancery during this last six or seven years have been noticed in this selection. It is intended hereafter to continue doing so regularly.

having been declined. 11. Power to appoint by writing under Seal — Appointment by will not valid — 1 Vict. c. 26. 12. Receiver — Manager — Mines — Disputes between Joint-owners and Partners. 13. Vendor's Lien — Equitable Mortgage by Deposit of Title Deeds — Priorities. 14. Voluntary Assignment — Choses in Action. 15. Ward of Court — Enlistment of — Jurisdiction. 16. Will — Construction — Next of Kin — Period of Distribution. 17. Witness — Expenses of, when summoned to attend Master under the Winding-up Act.

1. THE ATTORNEY-GENERAL V. THE EARL OF POWIS.

1 Kay, 186.

Charity — Election of Clergyman — Cateris paribus — Construction of — Injunction to restrain Clergyman improperly elected taking possession of Living.

By an Act of Parliament (38 Geo. 3. c. 68.), entitled "An Act for the better Government and Regulation of Shrewsbury School," it was, amongst other things, declared, that the right of nomination to the church of St. Mary's was in the mayor, aldermen, and assistants of Shrewsbury, and their successors. And it was enacted that they should appoint "*a fit and proper person*, duly qualified according to law;" provided that, in such appointment, such a person should be *preferred, cateris paribus, who should have been brought up at the school, and should be a graduate, and also a son of a burgess of Shrewsbury*; and if there were no burgess's son, then a preference was to be given, in like manner, to such person of the above description, born in the parish of Chirbury, except that it should be lawful to bestow the living upon either of the masters of the said school, after he should have resigned his mastership, notwithstanding any such claim or preference as last aforesaid, and that such master should be capable of holding the living "equally the same as if he had been of the description hereinbefore mentioned." The Trustees elected a clergyman, who, although he had been educated at Shrewsbury School, was not the son of a burgess; and they rejected several candidates who answered all the conditions of being sons of burgesses, of having been brought up at the school at least two years immediately preceding their going to one of the universities, of being graduates of one of the universities, and of *being fit and proper persons* duly qualified by law. Upon an information filed against the trustees, Wood, V. C. issued an injunction restraining the clergyman elected by the majority of the trustees from taking possession of the church, he being of opinion that the words, "*cateris paribus*," in the statute, had reference to the previous qualification of being "*a fit and proper person, duly qualified by law*," and not to the general qualifications of a clergyman.

2. FORBES v. FORBES. 1 Kay, 341.

Domicil — by birth — new, how acquired — Anglo-Indian — where Persons have Residences in different Countries.

In this case, in which many important points upon the law of domicil were discussed, Sir W. P. Wood, V.C., after remarking that no attempt had been made, at least, in our law, to define domicil, adds, "I consider the following propositions to be thus settled:—

"1. That a man cannot, at least with reference to the law of succession to personal estate, have two domicils. (This is treated as settled by Lord Alvanley, in *Somerville v. Somerville*, 4 Ves. 749.)

"2. That every person born in wedlock acquires, by birth, the domicil of the father; and thus, except in the case of a nomadic horde, of which, perhaps, the gypsies are the only instance in Europe, 'quorum plaustra vagos ritè trahunt domos,' every one must have a domicil of origin; and it is therefore evidently more logical to commence an investigation of the question of a man's domicil from a certain origin, namely, his domicil at birth, than from an accidental circumstance, such as his place of residence at his death.

"3. That the domicil of an infant cannot be changed by his own act.

"4. That a new domicil cannot be acquired except by intention and act, '*animo et facto*;' and apparently, if a man be *in itinere*, it is a sufficient act for this purpose.—(See Sir John Leach's judgment in *Munroe v. Douglas*, 5 Madd. 379.)

"5. As a corollary, perhaps, to the last proposition, the strongest intention of abandoning a domicil and actual abandonment of residence, will not displace the domicil unless another be acquired."

Upon another point his Honour observed: "I think it concluded by authority, in which conclusion my reason entirely acquiesces, that a service in India, under a commission in the Indian army, of a person having no other residence, creates an Indian domicil." . . . "There may be a difference between an Anglo-Indian and an English domicil."

His Honour also held that where a married man has two houses, in both of which he has been in the habit of residing, he ought to be considered as domiciled in that house in which his wife and principal establishment of servants always remained. "If," said his Honour, "in applying to our own times the definition of the Code '*ubi quis larem ac fortunarum suarum summam constituit*,'

an equivalent be sought to 'larem,' the wife would, I think, without impropriety, be regarded as the tutelary genius of our homes.

"The expression,

" 'Linquenda tellus, et domus, et placens
Uxor,'

shows how close was the association of wife and home in the mind even of a heathen poet (Hor. Lib. 2. Carm. 14.)"

Lord Brougham has taken this view in that part of his speech on moving the judgment in Sir George Warrender's case (2 C. & F. 337.), where he says;—"A connection formed for cohabitation, for mutual comfort, protection, and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile, the place so beautifully described by the civilian—'Domicilii quoque intuitu conveniri quique potest in eo scilicet loco in quo Larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil avocet, undeque cum profectus est peregrinari videtur.'"

Pothier, in the passage of the *Coutumes d'Orleans*, cited in *Munroe v. Douglas* (5 Madd. 393.), lays this down as the first of the distinctions in favour of one of two residences as to domicile, and says that one should decide "pour le lieu où il laisse sa femme et sa famille lorsqu'il va dans l'autre."

Gratius, in speaking of the criteria of domicile, says, "Accedit altera conjectura ex invectione familiæ et bonorum" (Phill. 118, n.); and Lord Stowell, in the case of *The Phoenix* (3 Rob. 189.), says, "He is not a married man holding any connection with that place by the residence of his wife and family."

Story, in his "*Conflict of Laws*," says, 'If a married man has his family fixed in one place, and does his business in another, the former is considered the place of his abode,' though, as Dr. Philimore observes, he does not cite any decided case to that effect.

The effect of the residence of the wife being, after all, but evidence of intention, may be rebutted by stronger evidence of a contrary character. If, as in Sir George Warrender's case, the husband were living apart from the wife; if, perhaps, some particular state of health required the wife to reside in a warm climate not agreeable to her husband, or the like, so that he was obliged to

visit his wife away from home, he might still be domiciled at a residence of his own apart from her."

3. *FEARON V. FEARON.* 2 Ir. Ch. Rep. 19.

Election — Power of Appointment.

Held by Lord Chancellor Blackburne that there is not any authority for the proposition, that a case of election can be only raised when the property conferred upon a person, in lieu of that to which he would otherwise be entitled, must be the absolute property of the giver; an appointment, under a power vested in him, is sufficient to compel the appointee to elect.

4. *SANDERS V. RODWAY.* 16 Beav. 207.

Husband and Wife — Separation Deed — Injunction to restrain Husband from violating Provisions of.

Courts of Equity, differing in this respect from the Ecclesiastical Courts, not only recognise the validity of separation deeds between husband and wife, but will, in proper cases, enforce them. Thus in the above-mentioned case, where, by a separation deed, a husband covenanted with his wife's father that she, during her life, might live separate from him, that he would not sue her in the Ecclesiastical Court for living separate, and that he would not molest her, nor claim any of her property; and her father covenanted with the husband to maintain her and indemnify him: Sir J. Romilly, M.R., *held* that the covenant did not expire by the death of the lady's father, and that the husband ought to be restrained from violating the covenants contained in the separation deed.

5. *HATCHELL V. EGGLESO.* 1 Ir. Ch. Rep. 215.

Husband and Wife — Mortgage of Wife's Leaseholds by Husband — Equity to a Settlement.

A husband entitled *jure mariti* to leasehold property, mortgaged it, and upon the mortgagee filing a bill for foreclosure, it was contended that the wife had an equity to a settlement out of the leaseholds. *Sturgis v. Champneys*, 5 My. & Cr. 97.; *Hanson v. Keating*, 4 Hare, 1.; and *Newenham v. Pemberton*, 1 De Gex and Sm., 634., were cited. Lord Chancellor Brady, however, held that the married woman was not entitled to a settlement. "This,"

said His Lordship, "is not at all the case of a party coming to obtain relief in Equity against the right of a married woman. The petitioners merely ask the Court to foreclose a mortgage vested legally in them. If they choose to bring an ejectment, there is nothing to prevent them obtaining possession of the lands. The cases cited for her do not govern the present case."

6. *BYRNE V. LORD CAREW.* 13 Ir. Eq. Rep. 1.

Husband and Wife — Separation Deed.

A deed recited differences between a husband and wife, and an agreement to execute it, in order to secure a maintenance for her in case such differences were renewed, and she should thereafter wish to live separate; and as an encouragement and recompense for her care of their children and domestic affairs while they should live together, and in order to secure an annuity to her in case of separation, and as a reward for her services so long as they should live together, the husband assigned certain property to trustees, to secure the annuity for her separate use, to commence immediately, and be payable during her life. It contained a covenant by the husband to allow the wife at her option to live separate, and by the trustees to indemnify him while she should do so. *Held* by Lord Chancellor Brady, that as the annuity was payable to the wife *at all events*, the deed was a good voluntary deed, and was not void as an encouragement to future separation, though containing illegal clauses. "I look," said his Lordship, "upon this as a case in which the husband was prevailing on the wife to live *with* him."

7. *WHITMORE V. MACKESON.* 16 Beav. 126.

*Misrepresentations—When Proceedings in consequence of, should be taken at Law—
When in Equity.*

It is sometimes a matter by no means free from difficulty to determine whether proceedings ought to be taken at Law or in Equity against a person who has made misrepresentations by which a loss has been sustained by the person to whom they were made. The rule as laid down and acted upon by the Master of the Rolls in the above-mentioned case is one which it will be useful to bear in mind, viz.: that when a person states *a fact* to be true on the faith of which another acts, a Court of Equity will compel him to make his assertion good; but where a person has given a *general character* respecting another, Equity cannot compel him to make good the

representation made by him, but the remedy will be by an action at Law, for damages occasioned by the misrepresentation. In *Whitmore v. Mackeson*, it appeared that the defendant, a solicitor, proposed that the plaintiffs, the Reliance Assurance Office, should make a Mr. Smith an advance of 300*l.* on the security of a leasehold house, and a policy to be effected in their office on his life, with a surety for the premiums. The money was advanced upon the solicitor assuring the office by letter that in his opinion Mr. Smith would be able to pay the 300*l.* by instalments, as proposed. The plaintiffs filed a bill, alleging this to be a false and fraudulent misrepresentation, and seeking to make the solicitor personally liable. Sir J. Romilly, M.R., held that the plaintiffs' remedy, if any, was at Law. "The rule," said his Honour, "of this Court is, that Equity will compel a person who misrepresents a fact or gives an undertaking, to make it good; but it will not do so in such a manner as to interfere with the regular and proper province of a Court of Law Though a person who misrepresents the character or the credit of another may be liable for the damage occasioned by such misrepresentation, yet the amount can only be determined in a Court of Law by an action for damages, and not in this Court; although cases may arise in which it may be difficult to draw the line and determine whether an action at Law or a suit in Equity would be the proper remedy If, in respect of the letter, the solicitor is liable to the plaintiffs, and they can prove that they were misled by it, and advanced their money upon the security of it, the proper course for them to take is, to seek their remedy by an action in a Court of Law, and not by a suit in a Court of Equity. If I made a decree, I should be giving the plaintiffs damages for a general statement as to character. I am therefore of opinion that the bill must be dismissed with costs."

8. RHODES v. BUCKLAND. 16 Beav. 212.

Mortgagor and Mortgagee—Puisne Mortgagee offering to pay off first Mortgage—First Mortgagee restrained from selling under Power.

A puisne encumbrancer offered to pay the first mortgagee principal, interest, &c., which being declined, he filed a bill to compel a transfer. It was held by Sir J. Romilly, M.R., that the first mortgagee, having afterwards proceeded to sell the property, under a power of sale, ought to be restrained from transferring the first mortgage, and from parting with the legal estate and title deeds. "If," said his Honour, "a plaintiff comes forward, on a bill to

redeem, and asks to restrain a transfer, he is bound to make out a *prima facie* case, and cannot as a stranger say, 'I am entitled to redeem, and restrain the transfer of the legal estate.' That is all that is decided by *James v. Bion*, 3 Swanst. (234.), and to that extent I concur. But I am of opinion that the plaintiff has made out a *prima facie* case, and that she is an encumbrancer on the property; but in what rank, or who are the persons entitled to redeem or foreclose, I express no opinion. If I were to say that, pending the suit, the defendants may sell the property under the power of sale, and make a conveyance and transfer of the legal estate, I should on this motion be determining that the plaintiff has no right; for if she went on and established her right to redeem, it would be impossible for her to obtain any benefit at the hearing, as the purchaser, under the execution of the power, would get a title to the estate. I am of opinion that, under the circumstances of this case, the principle of protection of the property pending litigation ought to be applied, so as to induce me to restrain any dealing with the legal estate until I can determine the rights. The argument of the defendants has tended to the very same conclusion; for they say, that the Court cannot deal with the legal estate until it sees who is entitled to it. In this I concur; but am I to allow the defendants to do that which the Court itself will not do? I am of opinion I ought not, and that I ought to protect the property until it can be seen who is entitled to it. . . . The plaintiff asks, that while the matter is in dispute and discussion, the defendants may be prevented defeating the sole objects of her suit. It is obvious, that if this be allowed, any first mortgagee, by collusion with the mortgagor (which I do not impute in this case), might wholly defeat the right and title of any puisne encumbrancer."

9. EVANS V. CASSIDY. 11 Ir. Eq. Rep. 243.

Nun — On Profession does not become civiliter mortua.

The principal question in this case was, whether by the effect of the Acts for the relief of Roman Catholics, the ancient rule, that profession caused civil death, had not been revived. The Master of the Rolls (the Right Hon. T. B. C. Smith), after an elaborate examination of the authorities, came to the conclusion that the doctrine of civil death by profession ceased to be law at the Reformation, and was not revived by the Roman Catholic Emancipation Act. "The effect," said his Honour, "of the argument on the part of the defendant would be to re-impose, and not to re-

move a disability, and such is not, in my opinion, the construction of the Act. (See section 37.) It was never, I believe, argued, until the recent case of *M'Carthy v. M'Carthy*, that civil death was now to be recognised. In the Ecclesiastical Courts, probate or administration would not be granted to the executor or next of kin of a lady who had taken the veil. If the defendant's argument be well founded, a charge upon land or other personal property, vested in a nun, would not, as at Common Law, become vested in her personal representative, but the property would be irrecoverable. So also, according to the argument of the defendant's counsel, bequests to ladies by name who happened to be professed would be void, a devise to a person professed being void by the Common Law. . . . If a defendant in a suit in this Court, entitled in fee, or quasi fee, to real estate, was to take the veil, it would be necessary, according to the argument, to file a bill of revivor against her heir at law. Upon the whole I am of opinion that there is no foundation whatever for the opposition to his motion. *First*, because no legal proof could by the Common Law be given of profession, except by the certificate of the Bishop, which certificate could not now be obtained. *Secondly*, because it is clear from the authorities referred to, that from the period of the dissolution of the monasteries, or at least from the Act of Uniformity to the time when the Acts were passed for the toleration of Roman Catholics and the removal of the disabilities to which they were subject, profession was not recognised by law, nor the consequence, which at Common Law followed therefrom, of civil death; and the 37th section of 10 Geo. 4. c. 7., which exempted females bound by religious or monastic vows from the penal provisions of the Act, did not, in my opinion, revive as to them the disability and incapacity to which profession subjected all persons by the Common Law."

10. *M'CARTHY v. M'CARTHY*.¹ 9 Ir. Eq. Rep. 620.

Nun — Assignment by, to Convent — Bill to enforce, dismissed with Costs — Issue to try whether Deed freely executed having been declined.

Two Ursuline nuns executed an assignment of their distributive shares of their father's assets in trust for their convent. It appears to have been proved that the deeds were executed by the nuns against their wishes, and under the influence and spiritual terror of their vows. The deeds contained powers of attorney,

¹ The Bill in this case was dismissed in the House of Lords, on the ground of misjoinder, without prejudice to a new Bill being filed. 1 H. L. Ca. 703.

and authorised the plaintiffs (among other things) to put in answers, if requisite, for the assignors. The assignees filed a bill to recover the shares, making one nun a co-plaintiff, and the other a defendant, neither of whom objected to the deeds in this suit; but it was proved to be without their concurrence, and the objection that the deeds were improperly obtained was made by the other defendants. The plaintiffs declining an issue whether the deeds were freely executed, the bill was dismissed with costs. The Lord Chancellor, after observing that he need not consider the question whether the ladies had by profession placed themselves in the position of civil death, known to the ancient law, added, "The society of the convent is so framed that the members of it are bound by the vows which they have taken on themselves, and the construction of these vows is declared by the society to be, that its members are no longer, from the moment of taking them, free agents in the distribution of their property. They are enslaved to the rules and regulations of the community which they have joined, and are without the possibility of relieving themselves, by any act of volition, from their vows. Whatever be their condition in society—whatever their connections with others—whatever their relations in life—regardless of every obligation of nature or society, they must adhere to these vows! Whether they be isolated individuals or members of a family—whether they be persons having no ties of kindred to bind them to the world, no objects to attach their feelings, to claim their affection and bounty, and entitled to their care,—or whether they be the reverse of this, and having the nearest ties of blood—even children (for widows after they have become such may enter these communities), or at least relatives in the next degree of kindred—yet it makes no difference: by the rules of the institution, they must cast all such considerations to the winds; and, willing or unwilling, freely offering it or not, of their own accord or under coercion of their vow, they must devote all their property to the benefit of the community, and execute deeds to transfer it. On such considerations I can *well understand and perfectly concur* in the policy of the ancient law, which placed persons thus circumstanced in the position of civil death. No difficulty, such as I referred to, then occurred; the law made the system harmonious and complete: they were left separated from the world to pursue the dictates of their consciences and follow the line of life which they had chosen; but they were not placed in this dreadful condition of being forced to tear their property from the persons whom they were most bound to regard and provide

for, and to give it to the members of a community for whom they might have no personal regard whatsoever. The ancient rule was, therefore, I think, a wise and prudent one; and whether it was a rule of the Canon Law or a doctrine of the Common Law, is immaterial. It was very wise not to allow the clashing of the vow of obedience and the dictates of duty."

Upon the evidence of the case, his Lordship said it was impossible to withhold the mind from coming to the conclusion that the nuns had executed the deeds "not as free agents, not of their own volition, but signed them, merely as persons who knew not how to write, and had a pen put into their hands and guided by another; and that if a *bill had been filed by the nuns*, it would be, of course, *on such* evidence to set aside such instruments. . . . It then comes to this: when it appears clear in a Court of Equity, that one of two co-plaintiffs joins in a suit from duress and coercion (I use words that may be stronger than are in strictness applicable to this case, because the argument must be pressed to that extent, if at all), and that duress and coercion continues to the very hearing of the cause, can it be argued that the Court is tied hand and foot, bound to entertain the suit, and give effect to the claim? During the argument I put the case of a prisoner in a dungeon, and a jailer extorting a deed from him, and coming into court and saying, 'I have that person still in the dungeon, but I want the property for him and myself.' Am I bound to give it to him? I protest I will do no such thing. This Court cannot listen to such a claim."

A case of a somewhat similar character had come before the Court of Chancery in Ireland some years previously, in the cause of *Whyte v. Meade*, 2 Ir. Eq. Rep. 420. There a young lady of the name of Whyte, being about eighteen years of age, and possessed of considerable real and personal property, entered into a convent, whether as postulant or pupil was in controversy, but upon an agreement on the part of the nuns that she should not be professed under age, or without their apprising her friends previously; and it appeared that she was professed under age, and in the absence of all her friends; and there was no evidence of any notice having been given to any of them, save an allegation in the answer of the defendants, that they did communicate the fact to her sister; and afterwards, when she arrived at full age, she assigned nearly all her property to the nuns, for the benefit of the convent; and it appeared that previous to this she had been excluded from the society of her friends, and that the deed for this purpose was pre-

pared by the professional agent of the convent, and that she had no friend of her own present; and having some time after quitted the convent, and upon a Bill being filed by her the whole transaction was set aside in the Equity side of the Exchequer. "Can it," said Pennefather B., in giving judgment, "be seriously said, that a transaction like this ought to stand? that a deed executed by a person placed at a convent like this person—placed in a situation where that undue influence is more likely to be exercised than in any other which courts of equity should interfere to prevent; and *shall it not be presumed, beyond almost a doubt so strong as not to be rebutted*, that the documents in question were executed by the plaintiff under undue influence?"

The consideration of these cases is by no means uninteresting at the present time, as there is now a Bill before Parliament, brought in by Mr. Whitehead, Mr. Malins, and Mr. Napier, to "secure persons under religious vows the free exercise of their lawful rights in the disposal of their property." It proceeds to enact that all acts of nuns are to be deemed not free, unless the contrary be proved (sect. 1.); that a person having been treated as a nun is to be presumptive evidence of her having taken the vows (sect. 2.); and that no validity is to be given to acts otherwise invalid or unlawful (sect. 3.).

This Bill is open to many objections. In the first place, it is a matter for important consideration whether a woman on profession ought not, according to the old law, to be considered for all civil purposes as dead. Again, if Parliament proposes to enact that which the Courts of Equity have full power at present to do, the Act would be simply useless if not mischievous. Again, why should the Act be confined to nuns?—might not monks be under the same influence? By inference, such an Act might appear to limit the power Courts of Equity at present undoubtedly possess. The principle upon which Courts of Equity act in setting aside transactions of this character "*is applicable*," as Lord Cottenham has well laid down the law, "*to all the variety of relations in which dominion may be exercised by one person over another*," (*Dent v. Bennett*, 4 My. and Cr. 277.); and it seems to be clear from the authorities, that a deed executed by a nun in favour of her convent would, *prima facie*, be considered as executed under undue influence, unless the contrary were proved to the satisfaction of the Court. This was evidently the view taken by Mr. Baron Pennefather in the before-mentioned case of *Whyte v. Meade*.

On the subject of gifts by nuns to convents, there are some in-

teresting cases in the Pleadings of D'Aguesseau, in his character of Advocate-General. See "La Cause des Héritiers de la Dame de Vaugermain contre les Religieuses du Saint-Sacrement,"¹ and "La Cause des Religieuses Ursulines de Castel-Sarrazin contre Guillaume-Gabriel de Charron, intimé, et Jean de Charron, intervenant."² The reasons given in the former case³ by D'Aguesseau for the law which rendered monasteries incapable of succeeding *ab intestat*, are so well applicable to any law which would prevent a convent from obtaining gifts from nuns or persons under their influence, that they may be here inserted. "Si nous voulons pénétrer dans les raisons de cette loi, nous trouverions que les grandes richesses des monastères, le zèle immodéré des fidèles, la crainte que l'on a eue de rendre les communautés religieuses héritières de tous les biens des particuliers, ont servi de fondement à cette disposition. L'on a considéré que nous n'étions plus dans ces temps heureux où la ferveur des moines, leur détachement des choses temporelles, la pauvreté évangélique qu'ils pratiquoient à la lettre, les mettoient à couvert des moindres soupçons d'avarice et de cupidité; qu'au milieu d'un grand nombre de saints religieux, il s'en trouverait quelques-uns aussi attentifs aux choses périssables qu'aux biens éternels, qui dresseroient tous les jours des pièges à la liberté des enfants de famille, qui abuseroient de la foiblesse de leur âge, du crédit qu'un extérieur de religion peut donner sur un esprit encore tendre et susceptible de toutes sortes d'impressions; enfin, on a cru qu'il y auroit une espèce d'injustice de permettre aux religieux de succéder, puisque l'avantage ne seroit pas réciproque, et que, pendant que personne ne succéderoit aux monastères, les monastères, au contraire, recueilleroient autant de successions qu'ils auroient de religieux. Mais ne trouvons-nous pas ces mêmes raisons de justice, d'intérêt d'état, de politique? Le public, les particuliers ne sont-ils pas toujours exposés à la même ruine, soit qu'un religieux porte avec lui dans une communauté l'espérance d'une succession légitime, ou qu'il apporte l'espérance d'une succession testamentaire? Manquera-t-on d'artifice, d'adresse, et d'intrigue pour attirer une riche veuve dans l'enceinte du monastère; pour la porter à laisser tous ses biens à une maison qui possède sa fille? Les vocations en seront-elles plus libres, les possessions plus volontaires, les religieuses moins attentives à engager des filles uniques à entrer dans leur communautés?"

¹ Œuvres D'Aguesseau, tom. i. p. 284. Paris, ed. 1819.

² Ib. tom. v. p. 514.

³ Ib. tom. i. p. 297.

11. WEST v. RAY. 1 Kay, 385.

Power to appoint by Writing under Seal — Appointment by Will not valid —
1 Vict. c. 26.

In this case Thomas West, the settlor, had reserved a power of appointing "during the term of his natural life, by any deed or deeds, writing or writings, under his hand and seal, to be attested by two or more credible witnesses;" and the question was, whether the will of the testator *not under seal*, but executed and attested in conformity with the requisitions of 1 Vict. c. 26., was not a valid execution of the power. In the case of *Buckell v. Blenkhorn* (5 Hare 131.), the Vice-Chancellor Wigram, under circumstances precisely analogous, held that a will so executed and attested was a good appointment, and that the case fell within that section of 1 Vict. c. 26. which enacts, that every will executed and attested in the manner required by the Act, should, "so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." In the case, however, of *Collard v. Sampson*, (17 Jur. 641.), where a suit had been instituted concerning the will of Thomas West, for the purpose of enforcing specifically a contract which depended on a title resting for its validity on the decision in *Buckell v. Blenkhorn*, their Lordships considered the decision in that case not to be so free from doubt, that a purchaser could be forced to take it. The point now coming before Sir W. P. Wood, V. C., his Honour, overruling *Buckell v. Blenkhorn*, held that the settlor's will was not a valid execution of his power. "I fear," observed his Honour, "that in nine cases out of ten, the intention, both of the donor and of the party executing the power, who of course intends to execute it effectually, will be defeated by such a decision. But the Legislature might have provided for the case, and has not done so. I must consider the origin of those decisions of the Courts of Law with reference to the solemnities required, in which it was held, that every formality must be complied with. The Courts of Law held this upon two grounds — first, because the donor of the power has declared how it must be exercised, and *cujus est dare ejus est disponere*; and, secondly, the Courts of Law regarded appointments under powers as in the nature of conditional limitations, to defeat existing uses, and considered that, therefore, they were to be strictly executed.

However, as it often happened, that some of the formalities were forgotten, and the intention would thus have been frustrated, the Courts of Equity, in certain favoured cases, have supplied the want of the required formalities. There still remain many instances in which the objection prevails; but, in the case of wills, the Legislature has interfered, and, instead of the many useless ceremonies that may be required for the execution of a power by will, has provided one form of execution and attestation, and, if that be complied with, all others are disregarded. The Legislature might have gone on to say, if the subject of deeds had been before them, that whatever instrument would be good as a deed, and was formally executed as a deed, should be a due execution of a power to be executed by deed, whatever other ceremonies might be required by the power; however, they have not done so. Now, I find in this settlement a power, not to appoint by will at all, but by deed or writing, with certain required solemnities. The decisions on this point before the statute were, in effect, that the donor of the power had thought the character of the writing, whether it should be testamentary or *inter vivos*, not of the essence of the case. All he had thought essential were the solemnities with which the power was to be exercised, and, provided they were observed, it was indifferent whether the instrument by which the power was exercised were a will or a deed; and when it was exercised by will, as in the case of *Lisle v. Lisle* (1 Bro. C. C. 533.), though the instrument is a will and revocable, yet, being executed with all the required ceremonies, and being within the words of the power, it was held to be a good execution of the power. But when the donor has made the required solemnities essential to the power, and has not stated that it is to be exercised by will, but only by deed or writing, can I hold that it falls within the 10th section of the statute 1 Vict. c. 26., which provides, that every will executed in manner therein-before required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity?"

12. ROBERTS v. EBERHART. 1 Kay, 148.

Receiver — Manager — Mines — Disputes between Joint-owners and Partners.

The Court will not appoint a receiver or manager at the instance of one of the partners or owners of a mine, where they have been

working it as tenants in common in partnership, or where the mine itself is in partnership, where the Bill does not seek a dissolution of the partnership; nor even when a dissolution is sought, will the Court, on an interlocutory application, appoint a receiver, merely upon evidence that the partners do not co-operate in the management of the business; but in order to sustain such an application, it is necessary to show that one partner has interfered so as to prevent the business being carried on.

13. *RICE v. RICE.* 2 Drew, 73.

Vendor's Lien — Equitable Mortgage by Deposit of Title Deeds — Priorities.

In this very important case a vendor had conveyed an estate without receiving his purchase money; the receipt for it was, however, endorsed on the deed, and the title deeds delivered over to the purchaser. The purchaser then made a mortgage by deposit, and absconded. It was held by Sir R. Kindersley, V. C., that as between the vendor's lien for his unpaid purchase money, and the right of the mortgagee, that the possession of the title deeds, and the fact of the endorsement of the receipt on the deed, gave the mortgagee the better equity. His Honour, after observing that the vendor's lien for unpaid purchase money and the right of the equitable mortgagee differed in some respects from each other, inasmuch as the former was a right created by a rule of the Court, whereas the latter arose from contract between the parties, added, "As far as relates to the nature and quality of the two equitable interests abstractedly considered, they seem to me to stand on an equal footing. . . . It appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, every thing seems in favour of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared in the most solemn and deliberate manner, both in the body and by a receipt endorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum by way of equitable mortgage as a security for the unpaid purchase money, and if they had done so, they would have been secure against any subsequent

equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorised and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had, in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at Law and in Equity.

"The mortgagee was guilty of no negligence; he was perfectly justified in trusting to the security of the equitable mortgage, by deposit of the deeds, without the slightest obligation to go and inquire of the vendors whether they had received all their purchase-money, when they had already given their solemn assurance in writing that they had received every shilling of it, and had conveyed the estate and delivered over the deeds; and I do not think that the fact of the conveyance bearing date only the day before the mortgage, imposed on him any such obligation. The defendant omitted nothing that was necessary to constitute a complete and effectual equitable mortgage; and although the mortgage was taken, not for money actually advanced at the time, but for an antecedent debt, the forbearance of that debt constitutes a full and sufficient valuable consideration. Upon a comparison, then, of the conduct of the two parties, and a consideration of all the circumstances of the case, and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect *bona fides*, and without any wrong done to the vendors, I am of opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail."

14. VOYLE v. HUGHES. 2 Smale & Giff. 18.

Voluntary Assignment — Choses in Action.

The law relating to the subject of voluntary assignments of choses in action has long been in a most unsatisfactory state, and notwithstanding the efforts of various judges to rest their decisions upon special circumstances, it is impossible to reconcile them upon any general principle. On the whole the mere result of the

authorities, independent of the abstract merits of any particular doctrine, or of its convenience to the public, appears to have been correctly stated by Sir James Wigram, in the case of *Meek v. Kettlewell*, viz., that an assignment under seal of that which does not pass at law by the operation of the assignment itself, unaccompanied by other acts, stands on no better ground than a covenant or agreement to assign, which it is clear a Court of Equity would not enforce when not supported by a valuable consideration. This doctrine, however, led to much inconvenience and litigation; for it was a matter by no means free from doubt what Acts were sufficient to render such an assignment so complete and perfect as to be enforceable in a Court of Equity; whether mere notice to the trustees, their consenting to act or acting upon the trusts, was sufficient for that purpose. In the important case of *Kekewich v. Manning* (1 De Gex, Mac. & Gord. 176.), this subject was very fully examined by Lords Justices Knight Bruce and Lord Cranworth. There the residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and for a niece of the daughter, and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death. It was held by their Lordships, overruling the decision of Vice-Chancellor Wigram, that even if the settlement was voluntary as regarded the trusts in favour of the niece, upon the ground of her not coming within the consideration of marriage, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage, inconsistent with the former settlement. "Suppose," observed Lord Justice Knight Bruce, "stock or money to be legally vested in A., as a trustee for B. for life, and, subject to B.'s life interest, for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D., by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity, or with reason or expediency, to hold the contrary, C. being *sui juris*, and acting freely, fairly, and with sufficient advice

and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary to the complete validity of such a transaction, that notice should be given to A. Upon that we do not express an opinion. Suppose the case only varied by the fact that A. and C. are the trustees jointly, instead of A. being so alone? Does that make any substantial difference as to C.'s power, the mode of making the gift, or the effect of the Act, C. not severing nor affecting the legal joint tenancy? C. would necessarily have notice. Possibly it may be thought material that A. should have notice likewise, but upon that we avoid saying anything beyond referring to *Meux v. Bell* (1 Hare, 73.), and to *Smith v. Smith*, mentioned in *Meux v. Bell*."

"The cases of *Ellison v. Ellison* (6 Ves. 656.), *Pulvertoft v. Pulvertoft* (18 Ves. 84.), and *Ex parte Pye* (18 Ves. 140.), appear to us not merely to contain no doctrine opposed to the plaintiffs, but to be in their favour. Not only do we not question anything said in either of those cases by Lord Eldon, but we are persuaded that had the present case come before him, he would have decided it against the defendants. Of *Antrobus v. Smith* (12 Ves. 39.), we need say no more than has already been said. As to *Wheatley v. Purr* (1 Keen. 551.), the report of which has '1835' for '1825,' and seemingly an incorrect marginal note, the author of the trust could have transferred the legal title, but appears not to have done so. Lord Langdale nevertheless established the trust. That case, and those of *Cadogan v. Sloane* (Sug. V. & P. 1119, 11th edit.), *Fortescue v. Barnett* (3 Myl. & K. 36.), and *Blakely v. Brady* (2 Dr. & Walsh, 311.), are, in our opinion, direct and clear authorities for the plaintiffs. But others cited during the argument are said to be strongly opposed to their title to relief. Whether these authorities, and particularly whether *Colman v. Sarel* (3 Bro. C. C. 12.; 1 Ves., jun., 50.), *Colyear v. Lady Mulgrave* (2 Keen. 81.), *Ward v. Audland* (8 Beav. 201.), *Holloway v. Headington* (8 Sim. 382.), *Dillon v. Coppin* (4 Myl. & Cr. 647.), *Jefferys v. Jefferys* (1 Cr. & Ph. 138.), *Godsal v. Webb* (2 Keen. 99.), *James v. Bydder* (4 Beav. 600.), *Beatson v. Beatson* (12 Sim. 294.), *Bayley v. Boulcott* (4 Russ. 345.), *Tufnell v. Constable* (7 Add. & Ell. 799.), *Gaskell v. Gaskell* (2 Y. & J. 511.), *Farquharson v. Cave* (2 Coll. 356.), *Edwards v. Jones* (1 Myl. & Cr. 226.), and *Meek v. Kettlewell* (1 Hare, 475.), or any one or more of them, ought, in our opinion, to be considered as contravening or contravened by *Ellison v.*

Ellison (6 Ves. 656.), Cadogan v. Sloane (Sug. V. & P. 1119., 11th edit.), Fortescue v. Barnett (3 Myl. & K. 36.), Wheatley v. Purr (1 Keen. 551.), or Blakely v. Brady (2 Dr. & Walsh, 311.); or as opposed to the plaintiffs' title to relief, we think it unnecessary to say; for assuming that contravention; assuming that opposition, we think, nevertheless, that Ellison v. Ellison (6 Ves. 656.), Cadogan v. Sloane (Sug. V. & P. 1119., 11th edit.), Fortescue v. Barnett (3 Myl. & K. 36.), Wheatley v. Purr (1 Keen. 551.), and Blakely v. Brady (2 Dr. & Walsh, 311.), support, and are authorities for, the plaintiffs' claim; that we are justified in following those five cases, so far, at least, as is necessary for the purpose of giving effect to it, circumstanced as it is, and we do so accordingly. In this we are certainly differing from the very able, learned, and careful judge, before whom the suit originally came. He, however, in the particular station which judicially he filled with so much advantage to the country, *may have considered himself placed in a position with respect to former decisions in which we do not consider ourselves to be.*"

In the above-mentioned case of Voyle v. Hughes, the Vice-Chancellor Stuart held a voluntary assignment of an equitable reversionary interest in stock, transmitted to one of the trustees, to be valid. "According," observed his Honour, "to the decision in the case of Meek v. Kettlewell (1 Hare, 464.; S. C., on appeal, 1 Ph. 342., as affirmed on appeal), this instrument is to be treated, not as an assignment, but as a mere agreement; and, being voluntary, and without any valuable consideration to support it, it confers no right on the seeming assignee to which this Court can give effect. The soundness of the doctrine which treats a deed of assignment, complete in form, as a mere agreement, although it in terms assigns and transfers an equitable reversionary interest in personal property, and which denies to it in this Court, if voluntary, any effect as a transfer of the right to property, has been much questioned. If that doctrine is to prevail, it deprives the owners of reversionary personal property of the right of alienation by one legitimate mode. As abridging the right of alienation, it materially lessens the value, to its owners, of the enormous and increasing amount of reversionary personal property. Fortunately, in the recent case of Kekewich v. Manning (1 De Gex, Mac. & Gord. 176.), a more liberal and enlightened view of the law upon this subject was taken." "As to treating an assignment by deed as a declaration of trust, or refusing to it any operation because it cannot be properly treated as a declaration of trust, there seems no legi-

timate ground for such an argument. If a deed of actual assignment of an equitable interest has any operation in Equity, as divesting the assignor of his equitable right, it is an operation no more in the nature of declaring a trust than any other actual conveyance of any equitable estate or interest in real or personal property. Therefore, there seems no other just view of this case than that which treats the instrument as an actual deed of assignment, and not as a mere agreement or executory instrument; and if, in the case of an assignment of an equitable reversionary interest in personalty for valuable consideration, the assignment being by deed, transfers the property from the assignor to the assignee, and is not a mere agreement, the actual assignment by deed of the same kind of property, without any valuable consideration, is not a mere agreement, and is not merely executory, but is an actual transfer of an equitable right. This puts it beyond the infirmity of an incomplete gift, or the case of a right resting merely in contract, which requires a valuable consideration to induce a Court of Equity to interfere."

15. *ROCHFORD v. HACKMAN.* 1 Kay, 308.

Ward of Court — Enlistment of — Jurisdiction.

A ward of the Court, about seventeen years of age, having enlisted in the East India Company's Service, and on the point of being shipped with other recruits to the West Indies, Sir W. P. Wood, V.C. ordered a *habeas corpus* to be issued to the sergeant in charge of the recruits, to bring up the body of the ward, and on the return of the writ he was accordingly brought to the Bar of the Court. His Honour thereupon made an order, that the infant should not be removed out of the jurisdiction without leave of the Court, and directed the order to be served on the East India Company, and their officer in command at the depôt, and that the motion should stand over until the next motion; and upon that day, the Company and their officer having been duly served, his Honour, upon the authority of *Harrison v. Goodhall* (1 Kay, 310 n.), decided by the late Vice-Chancellor, Sir James Parker, ordered that the infant should be discharged and delivered over to his guardian. The case of *Bond v. Roberts*, cited in *Rochford v. Hackman*, is an apt illustration of the great lengths to which the Court of Chancery will go in protecting its wards. In that case a ward had been taken in execution in an action for *necessaries*, by a tradesman, and was in Whitecross Prison, and the Vice Chancellor of England

ordered a *habeas corpus* to be issued to the Sheriff to bring up the body of the ward, and ordered the plaintiff in the action to attend at the bar of the Court at the same time; and upon such attendance an order was made discharging the infant out of the custody of the sheriff, the Court reserving the question whether the tradesman should *pay the costs* of the order and of the application.

16. IN THE MATTER OF THE TRUSTS OF THE WILL OF DANIEL BARBER, AND IN THE MATTER OF THE TRUSTEE RELIEF ACT. 1 Smale & Giff. 118.

Will — Construction — Next of Kin — Period of Distribution.

It has been laid down, as a general rule, that according to the authorities, where a testator gives property to a tenant for life, and after the death of the tenant for life, to his next of kin, and there is *nothing in the context to qualify*, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator *living at his death* will take; and *if the tenant* for life be such next of kin, either solely or jointly with other persons, he will not, on that account only, be excluded. See *Say v. Creed* (5 Hare, 587.); in which case, however, the Vice-Chancellor Wigram said, that while admitting the rule, it must be also admitted that it had been as much relaxed in some modern cases as it safely could be consistently with the preservation of the rule itself; and his Honour decided that case (upon special circumstances) as coming within the exception. Of late, the current of decisions seems to have turned strongly in support of the rule. (See *Smith v. Palmer*, 7 Hare, 225; *Seifferth v. Badham*, 9 Beav. 370.; *Urquhart v. Urquhart*, 13 Sim. 613.; *Gundry v. Pinniger*, 1 De Gex, Mac. & Gord. 504.) Amongst other cases, that at the head of this notice, Barber's case, decided by Sir John Stuart, V.C., demands particular attention, as it appears to conflict directly with two decisions of Sir John Leach. In that case a testator gave his residuary personal estate to trustees, upon trust to pay the dividends to J. Bond and A. Laundon, and J. Laundon, for their lives, and the life of the survivor of them; and on the decease of the survivor "in trust, to divide the fund among the children of J. Laundon, and in default of such children, for all and every my next of kin, who *shall be* in equal degree, and those who legally represent them according to the statute." It was contended by counsel, on behalf of the next of kin of the testator, *at the death* of the tenant for life, John Laundon, that the words made use of by the testator, "My next of kindred *who*

shall be," &c., evidently referred to a future time, and that the persons who would be the testator's next of kin at the period of division were intended. No cases, however, appear to have been cited upon the effect attributable to those words, and his Honour was of opinion that A. Laundon, one of the tenants for life, who was, *at the time of the testator's death*, his sole next of kin, was entitled to the fund. This case seems inconsistent with *Briden v. Hewlett* (2 My. & K. 90.), and *Butler v. Bushnell* (3 My. & K. 232.), both decided by Sir J. Leach, M.R. In the former of those cases a testator gave his personal estate to trustees, upon trust to convert it into money, and invest the same, and to pay the interest to his mother for her life; and after the decease of his mother he gave all his estate and effects to such person or persons as she should, by her will, direct and appoint; and in case his said mother should die without a will, then to such person or persons as *would* be entitled to the same by virtue of the Statute of Distributions. The mother survived the testator, and died intestate; and it was held that the testator's next of kin, *at the death of the mother*, was entitled to the bequest. His Honour said, "It is impossible to contend that this testator meant to give the property in question absolutely and entirely to his mother, *because* he gives it to her for life, with a power of appointment. In case of her death, without a will, the testator gives his property to such person or persons as *would* be entitled to it by virtue of the Statute of Distributions. Entitled at what time? The word *would* imports that the testator intended his next of kin at the death of his mother." In the similar case of *Butler v. Bushnell*, his Honour, after reasoning in the same manner, came to the same conclusion. "The words 'such persons as *shall* happen to be my next of kin,' or 'such persons as *shall* or *should* be my next of kin,' indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the death of the tenant for life." With regard to these decisions of Sir John Leach, it must be remarked that one ground upon which he apparently proceeded, viz., the improbability that a person who was tenant for life, should be intended to take as next of kin, has been long since disregarded. With regard to the use of such words as '*shall be,*' or '*should be,*' my next of kin, Sir J. Leach appears to have attributed too much importance to it; for as the testator's death is a future event, he might as accurately make use of words of futurity with reference to it, as with reference to another future event, viz., the death of the tenant for life. On the whole, then, the decision of Sir John

Stuart in Barber's case, although conflicting with the decisions of Sir John Leach, appears to be both founded upon a correct principle and to be in accordance with the current of the authorities.

17. IN THE MATTER OF THE NORTHERN AND SOUTHERN CONNECTING RAILWAY COMPANY, AND OF THE WINDING UP ACTS. MERCER'S CASE. 1 Smale & Giff. 87.

Witness — Expenses of, when summoned to attend Master under Winding-up Act.

A person having been summoned, under the 63rd section of the 11th and 12th Vict. c. 45. (Winding up Act, 1848,) as a contributory, to attend before the Master, it was held by Sir J. Stuart, V.C., that he was entitled to have his travelling expenses tendered to him, by analogy to the rule at law. Upon the case coming before the Lords Justices on appeal, the matter was arranged, but Lord Justice Turner intimated that his opinion was in favour of the decision of the Vice-Chancellor. (*See* 18 Jur. 161.)

II. POINTS DETERMINED IN THE COURTS OF COMMON LAW.

(By ALEXANDER PULLING, Esq., Barrister-at-Law.)

COURTS.	REPORTERS.
Queen's Bench	- 17 Queen's Bench, Parts 1 & 2. 2 Ellis and Bl., Part 3.
Common Pleas	- 12 Common Bench, Part 3. 13 Common Bench, Part 1.
Exchequer	- 9 Exchequer, Parts 2 & 3.

1. Carriers — Notice limiting Liability — Effect of. 2. Consequential Damage — Liability of Carrier, for Delay in Carriage of Goods. 3. County Court — Effect of Judgment of — Action on, in Superior Court. 4. Distress — Damage feasant — Seizure of Locomotive Engine. 5. Easement — Party-walls — Mutual Right of Support of. 6. Foreign Potentate — Indemnity from Civil Process — Prohibition of Proceedings by Foreign Attachment against. 7. Foreign Attachment — Custom of London —

Jurisdiction — Residence of Parties. 8. Husband and Wife — Liability of Husband for false Representation by Wife. 9. Judge's Order directing Delivery of an Attorney's Bill — Action for Non-compliance with. 10. Negligence — How Carrier liable for, when Injured Party contributes to his own Misfortune. 11. Notice of Action — Officer of Customs — Questions of *bona fides* — Province of Judge — Decision without hearing Evidence. 12. Public Company — Evidence of Authority given to Officer of. 13. Statute of Frauds, s. 17. — Contract for Sale of Goods of the Value of 10*l.* — Evidence of Contract by Broker's Notes — When different Versions given to contracting Parties.

1. WALKER v. THE YORK & NORTH MIDLAND RAILWAY COMPANY. 2 Ellis & Bl. 750.

Carriers — Notice limiting Liability — Effect of.

This was a case in which the plaintiff sued the York and North Midland Railway Company as common carriers, for loss occasioned by delay in the delivery of fish forwarded by their railway. The Company had issued printed notices, stating that fish would be conveyed at reduced rates from Scarborough upon the condition, amongst others, that the Company was not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any market, nor for any loss or damage arising from any delay or stoppage, nor were they to be required to carry by any particular trains. The notice also stated that the station clerks or servants of the Company had no authority to alter or vary the conditions. The plaintiff delivered to the defendants some fish to be carried by their Railway from Scarborough to Manchester, and was served with a copy of the notice; he however objected to the station master that the notice was of no use, and not binding upon him. The presiding Judge (Coleridge J.) at the trial left to the jury the question of, whether or not the notice had been served upon the plaintiff, and whether a special contract existed between the plaintiff and the Company for the carriage of the fish upon the terms in the notice; and he directed them that if, being served with the notice, the plaintiff afterwards forwarded the fish, they ought to infer an agreement on the plaintiff's part to such terms, unless there appeared an unambiguous refusal by the plaintiff to be bound by the notice, and an acquiescence by the Company in that refusal, and that it was to be observed that the station master had no authority to alter or vary the notice. The jury found a verdict for the defendants. It was held by the Court of Queen's Bench, on motion for a new trial on the ground of misdirection,

that the direction was right, and that the jury were warranted in inferring a special contract to carry the fish upon the conditions stated in the notice, the plaintiff's objection to the station master being of no avail whatever. The Court held, also, that the 4th section of the Carriers' Act, 11 Geo. 4. & 1 Will. 4. c. 68., did not invalidate a contract so made.

2. HADLEY & ANOTHER v. BAXENDALE & OTHERS. 9 Ex. 341.

Consequential Damage — Liability of Carrier for, caused by Delay in Carriage of Goods.

In this case, the plaintiffs, the owners of a flour mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them; and the defendant's clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery. The delivery of the shaft to the consignee, to whom it had been sent as a pattern, was delayed for an unreasonable time, in consequence of which delay the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were consequently unable to work their mill from want of the new shaft, and thereby incurred the loss for which this action was brought. It was held by the Court of Exchequer that, under these circumstances, such loss could not be recovered in an action against the defendants as common carriers.

3. AUSTIN v. MILLS. 9 Exchequer, 288.

County Court — Effect of Judgment of — Action on, in Superior Courts.

This was an action in the Court of Exchequer to recover the sum of 32*l.* 5*s.* 8*d.*, the amount of a judgment in the County Court of Durham; the declaration containing, in addition to a count on the judgment itself, counts also for the consideration on which the judgment was founded. The Court of Exchequer on demurrer which raised the question, held, 1st, in accordance with *Berkeley v. Elderkin* (1 E. & Bl. 805.), that the count on the judgment itself could not be sustained; 2dly, that a plea of the County Court judgment to the counts on the original consideration was good, the County Court judgment being a final and complete decision of the case.

4. THE AMBERGATE, NOTTINGHAM, AND BOSTON AND EASTERN JUNCTION RAILWAY COMPANY v. THE MIDLAND RAILWAY COMPANY. 2 Ellis & B. 798.

Distress — Damage feasant — Seizure of Locomotive Engine.

In this case the declaration was for converting a locomotive engine. The defendants pleaded, secondly, that because the said engine was wrongfully on the defendants' railway, incumbering the same and doing damage thereto, the defendants seized and took the said engine as a distress for the damage done, and impounded the same, &c. Thirdly, as to the alleged conversion of the said engine, that the plaintiffs brought and continued the said engine upon the defendant's railway without having first obtained a certificate of the defendant's approval of the same, contrary to the statute, &c., wherefore the defendants removed the same from the railway a reasonable distance to a fit and convenient place, which was the conversion complained of.

The plaintiffs replied to the second plea, that the plaintiffs had the said engine in and upon the railway for the purpose of using the same &c. according to law, and under and by virtue of the powers and authorities in them vested by the statutes in that behalf; that the said engine was properly constructed, as directed by the Acts of Parliament in that behalf; that at and during all the times of their bringing and using the same upon the railway, the plaintiffs were ready and willing to pay the defendants all lawful tolls, charges, and demands. The plaintiffs now assigned to the third plea that the plaintiffs sued not for the removal or converting to the defendant's use, or depriving the plaintiffs of the possession of the said engine, as alleged and justified in the said plea; but for that the defendants converted to their own use, or wrongfully deprived the plaintiffs of the said engine, otherwise than as in the said plea mentioned. The defendants rejoined to the plaintiffs' replication, that the plaintiffs had not, before the making of the distress, obtained or applied for a certificate of the defendant's approval of the engine, but brought the same upon the railway without such certificate, contrary, &c. The defendants also pleaded to the plaintiffs' new assignment, that the place to which the engine was removed was land in the defendant's possession, contiguous to the railway, and that the defendants continued possessed of the railway during, &c.; that while the engine was staying in the said place in consequence of the re-

moval, the plaintiffs demanded the engine "for the purpose and in order that they, the plaintiffs, might, by the power of the steam of the said engine, move the said engine over and upon the said land of the defendants towards, unto, to, and upon the railway of the defendants, and there again on their said railway place and use the said engine by the power of its own steam, without having first obtained a certificate of approval as aforesaid," contrary, &c.; and that if the defendants had complied with the said demands, the plaintiffs would forthwith have, by the power aforesaid, moved the said engine over and upon the said land towards, &c., wherefore the said defendants, when the said demand was made, and to prevent, &c., refused to allow the plaintiffs to take possession of the said engine, &c. It was held by the Court of Queen's Bench, on demurrer, that the Common Law right of the defendants to seize the engine, damage feasant, was not taken away by the 116th section of the 8 & 9 Vict. c. 20., the remedy given by that section being cumulative, and therefore that the second plea was good. The Court also held that the plea to the new assignment by reasonable construction meant that the plaintiffs had made the illegal purpose alleged a part of their demand of the engine, and not merely that such purpose rested in intention, and therefore that the plea was good.

5. RICHARDS v. ROSE. 9 Exchequer, 218.

Easement — Party walls — Mutual Right of Support of.

In this case, one Alfred Batson had demised land to one S. O. Pierce on a building lease. Pierce built two houses thereon adjoining each other, and subsequently underleased to one Watmough, who mortgaged the two houses; and the assignee of the mortgagee under a power of sale, sold one house to the plaintiff and subsequently the other to the defendant. When the houses were built, there was no sewer under them; the defendant, with the consent of the Commissioners of Sewers, constructed one under his own house and communicated with the street sewer. A verdict was found for the plaintiff, damages 25*l.*, with leave to the defendant to move to enter a verdict for him if the Court should be of opinion that there was no such right to the support of the adjoining soil as alleged. It was held by the Court of Exchequer, on motion for a new trial, that the plaintiff was entitled to maintain an action against the defendant for excavating under his own house and removing his own soil, whereby the plaintiff's house

was deprived of support and sank. Pollock, C.B., made use of the following remarks: — "We are all of opinion, that where houses have thus been erected in common by the same owner on a spot of ground necessarily requiring their mutual support, either by a presumed grant, or by a presumed reservation, the same mutual dependence of each house on the rest remains, and therefore there is no foundation for the point reserved, that the house had not a right to the support of the neighbouring houses."

6. *RE WADSWORTH V. THE QUEEN OF SPAIN*, 17 Q.B. 171. 196.
RE HABER V. THE QUEEN OF PORTUGAL Ibid.

Foreign Potentate — Indemnity from Civil Process — Prohibition of Proceedings by Foreign Attachment against.

In the first of the above case, proceedings had been taken in the Mayor's Court in London, by Mr. Wadsworth, the holder of certain securities, called Spanish bonds, in order to attach certain funds belonging to the Spanish Government in the hands of bankers in the city. The bonds in question purported to be duly made and entered into by and on behalf of the Queen of Spain, and to bear interest to the holders; and Wadsworth, having entered a plaint in the Lord Mayor's Court, alleging that the Queen of Spain at the parish of, &c., and within the jurisdiction of that court, agreed to pay to the plaintiff, 2,000*l.*, the usual proceedings were thereupon taken according to the practice of the Mayor's Court, in order to issue process of foreign attachment, notices of which were served upon Don Schneidnagel, the agent in London of the Spanish Government, and Messrs. Martin and Co., the bankers, as garnishees, attaching certain monies in their hands remitted to them by the Spanish Government. The garnishees pleaded *nil habet* to the attachments, upon which issue was joined, but the Queen of Spain, the nominal defendant, had never appeared in the Mayor's Court. The bonds, which were issued and signed by Messrs. Ricardo as agents to the Queen of Spain, within the City of London, were in the following form:—

"Public debt of Spain. The bearer of this certificate is entitled to an annuity of 10 hard dollars, equivalent to 54 francs, at 2*l.* 2*s.* 6*d.* sterling, representing a capital of 200 hard dollars, 1,080 francs, or 42*l.* 10*s.* sterling, by virtue of the law decreed by the Cortes, and sanctioned by Her Majesty the Queen Regent of Spain, in the name of her august daughter, Dôna Isabel II., the 16th November, 1834, and of the treaty concluded between the

minister, Secretary of State for the Finance Department, and M. Ardouin, banker, of Paris, the 6th of December of the same year. The said annuity will be payable in Madrid, Paris, or London, at the option of the bearer, half-yearly, on the 1st of May and the 1st of November in each year, on presentation of the dividend warrant then due in Paris at the rate of 5 francs 40 cents per hard dollar, and in London at 4s. 3d. sterling also per hard dollar," &c. &c.

There were dividend warrants or coupons annexed, specifying the amount of the dividend payable in English money at Messrs. Ricardo and Co's., in London.

In the second case, M. De Haber claimed from the Queen of Portugal a sum of about 12,000*l.*, alleged to have been taken from De Haber, banker at Lisbon, by the Portuguese Government at the time of the banishment of Don Miguel; and De Haber proceeded in the same manner, by way of foreign attachment in the Mayor's Court, to attach certain monies remitted by the Portuguese Government to the Union Bank. De Haber's affidavit stated that the Queen of Portugal, as reigning sovereign and supreme head of the nation of Portugal, was justly and truly indebted to the deponent in the said 12,000*l.*, so had and received, and the attachment being issued, notices were served on De Brito, the agent to the Portuguese Government, and on the trustees of the London Joint Stock Bank. Writs of prohibition were applied for to the Court of Queen's Bench to stay the proceedings — and the rules coming on to be argued, both cases were heard before the Court of Queen's Bench delivered their judgment. In each case the rule for the prohibition was made absolute, it being *held* that property in England belonging to a Foreign Sovereign Prince in his public capacity cannot be seized under process in a suit instituted against him in this country on a cause of action arising here. Lord Campbell in delivering judgment, observing, "In the first place, it is quite certain, upon general principles, and upon the authority of the case of the Duke of Brunswick *v.* the King of Hanover (2 H. L. Cas. 1.), that an action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head, and that no English Court has jurisdiction to entertain any complaints against him in that capacity. Redress for each complaint affecting a British subject, is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations,

remonstrances, or acts of the British Government. To cite a foreign potentate in a municipal court for every complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent."

The statute 7 Anne c. 12., passed on the arrest of the Russian Ambassador, to appease the Czar, has always been said to be merely declaratory of the law of nations, recognised and enforced by our municipal law, and it provides (s. 6.) "that all process, whereby the person of any Ambassador or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void." On the occasion of the outrage which gave rise to the statute, Lord Holt was present as a privy councillor to advise the Government as to the fit steps to be taken, and, with his sanction, seventeen persons, who had been concerned in arresting the Ambassador, were committed to prison, that they might be prosecuted by information at the suit of the Attorney-General. Can we doubt that, in the opinion of that great Judge, the Sovereign himself would have been considered entitled to the same *protection, immunity, and privilege* as the minister who represents him?

7. WESTOBY v. DAY. 2 Ell. & Bl.

Foreign Attachment — Custom of London — Jurisdiction over original Cause of Action.

This was an action of debt, in which the defendant pleaded that the debt had been attached in his hands as garnishee in a plaint of debt in the Court of the Mayor and Aldermen of the City of London, by Caldwell and others against the plaintiff: the plaintiff replied that the alleged debt sued for in the Mayor's Court did not arise or accrue within the jurisdiction of that Court, nor had that Court at any time had jurisdiction thereof; and the Court of Queen's Bench held the replication bad on demurrer, the plea setting up payment by the defendant under a regular judgment and execution against him.

8. THE LIVERPOOL ADELPHI LOAN ASSOCIATION v. FAIRHURST AND WIFE. 9 Ex. 422.

Husband and Wife — Liability of Husband for false Representation by Wife.

This was a writ of error brought on a judgment of the Court of Passage of the Borough of Liverpool, under the 47th section of 16 & 17 Vict. xxi., which provides (*inter alia*) that "error may

be brought in any of Her Majesty's Superior Courts of Common Law." It appeared upon the trial of the cause that one of the defendants had, by means of falsely and fraudulently representing herself to the plaintiffs as being sole and unmarried at the time of her signing a promissory note as surety to them for a third person, induced them to advance a sum of money to such third person. The Court of Exchequer held that an action was not maintainable against the husband and wife on account of such false and fraudulent representation.

9. DENT v. BASHAN. 9 Exch. 469.

Judge's Order directing Delivery of an Attorney's Bill — Action for Non-compliance with.

In this case the declaration set forth a certain order made by Mr. Baron Martin, that the defendant and one Mr. H. Hutchinson, both being attorneys of, and subject to the jurisdiction of, the said Court, should within ten days deliver to the plaintiff or his attorney a Bill of Costs in all causes and matters wherein they had been concerned for the plaintiff; and, further, that they should give credit therein for all sum or sums of money by them received for or on account of the plaintiff; that the said order was upon the 24th day of January, 1853, served on the defendant; and that although a reasonable time for the delivery of the said Bill of Costs, in obedience to the said order, elapsed before the commencement of this suit, yet the defendant, and also Mr. Hutchinson, had disobeyed the said order, and had not now had either of them delivered a Bill of Costs containing such matters as by the said order were directed; nor had they, or either of them, rendered an account, giving credit for all or any sums of money received by them on account of the plaintiff; that had the defendant and the said Mr. Hutchinson rendered such account, a large balance would have appeared to have been due to the plaintiff on such account, and the plaintiff would have been enabled to have taken measures on such account to enforce payment of such balance. To this declaration the defendant demurred, and the plaintiff joined in demurrer, and the Court of Exchequer held that the action was not maintainable. Baron Parke said, "If there is an implied contract to render an account, it must be to do so upon request. I do not say that an attorney is not bound by an implied contract to deliver his bill when required, it may be that he is, but no request is shown. The question upon the declaration

is, whether the order may be enforced by action or not. It is said that this order may be sued upon, because it is collateral: that is the case of *Emerson v. Lashley*, 2 H. Bla. 248. There the order was as much collateral as the present, and it was held that no action would lie to enforce payment of the costs directed by the order to be paid. That case cannot be distinguished from the present, and the judgment must be for the defendant." Mr. Baron Alderson said, "The case of *Emerson v. Lashley* is entirely in point. These are only matters of practice; I entirely concur with what in *Emerson v. Lashley* fell from Lord Chief Justice Eyre and Heath, J., where the one says that such an attempt ought not to be encouraged, and the other, that to allow such an action would be productive of mischievous consequences."

10. *LYGO v. NEWBOLD.* 9 Exch. 302.

Negligence—How Carrier liable for, when injured Party contributes to his own Misfortune.

The plaintiff, a person of full age, hired the defendant's cart to carry her furniture for a short distance in London. The cart being thus loaded, the plaintiff, with the consent of the driver (the defendant's servant), rode with the furniture in the cart, which broke down, the plaintiff being thrown out and having her leg broken.

The Court of Exchequer held that the plaintiff was not entitled to recover for the personal injury she had sustained. This case was distinguished by the Court from the case of *Lynch v. Nurdin* (1 Q. B. 29.), where a child was entitled to recover for an injury caused by the defendant's cart and horse being left unattended, though the plaintiff directly contributed to the accident by mounting the wheel in play.

"The decision in *Lynch v. Nurdin*," says Mr. Baron Parke, "proceeded wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years." In short, that the plaintiff was blameless, and, consequently, that the act of the plaintiff did not affect the question; but here the plaintiff's conduct was blameful, as she had no business to get up into the cart without the defendant's permission."

11. **ARNOLD v. HAMEL.** 9 Ex. 404.

Notice of Action — Officer of Customs — Question of bona fides — Province of Judge — Decision without hearing Evidence.

This was an action for false imprisonment brought by the plaintiff against the defendant, an officer of the Customs; and the decision of the Court was upon the construction to be put upon the 117 & 118 sections of the 8 & 9 Vict. c. 87. By s. 117. it is enacted, "That no writ shall be sued out against, nor a copy of any process served upon, any person acting under the direction of the Commissioners of Customs for anything done in the execution of or by reason of his office, until one calendar month after notice in writing." S. 118. "Provided always, that no plaintiff, in any case, when an action shall be grounded on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid."

It appeared upon the trial before Pollock C. B. that no notice of action had been given in compliance with section 117.; and, therefore, it was contended by the defendant's counsel, that by the 118th section, the plaintiff was prohibited from giving any evidence of the cause of action. The learned Chief Baron being of that opinion, refused to receive any evidence, and directed a verdict for the defendant.

The Court of Exchequer, on motion for a new trial on the ground of misdirection, *held*, that under these enactments it is the province of the Judge to decide whether notice of action is necessary, and for that purpose he ought to hear evidence on both sides, so as to enable him to determine whether the defendant was an officer of the Customs, acting by reason of his office, and under a reasonable belief that his duty as such officer required him to act as he did.

12. **GILES v. THE TAFF VALE RAILWAY COMPANY.**
2 E. & B. 822.

Public Company — Evidence of Authority given to Officer of.

This was an action of trover brought by the plaintiff against the Taff Vale Railway Company to recover some quicks and plants, in which the defendants tendered a bill of exceptions to the ruling of the presiding Judge (Wightman J.) that there was sufficient evidence of

a conversion by defendants. By the bill of exceptions, which set forth the whole of the evidence, it appeared that plaintiff was a contractor planting hedges for the defendants at one of their stations, and was the owner of live thorn plants which had been by leave of Fisher, the general superintendent of the Company, placed in a piece of ground belonging to the defendants, and close to the station. The plaintiff demanded these thorns from the station master, and was referred to Fisher, and Fisher, professing to act for the defendants, refused to let the plaintiff remove them. It did not appear distinctly when or under what circumstance the thorns were brought to the station.

It was held by a majority of the Judges in the Court of Exchequer Chamber, that the true construction to be put upon the bill of exceptions was, that the thorns had been carried as merchandise on the line, and left in the defendant's ground with their roots covered, as a mode of warehousing them for a reasonable time in such a manner that they might remain alive. It was held by all the Judges, that it is the duty of a Company, carrying on trade, to have on the spot an officer to do for the Company all that in the ordinary exigencies of their business might require to be done promptly: that in this respect there is no difference between an ordinary partnership and a corporation; that there was sufficient evidence that Fisher had authority to this extent from the defendants, and that it was not necessary to show any authority under seal.

It was held also by all the Judges that, to give up, or refuse to give up, on demand, goods left with the defendants, in the course of their trade as carriers, was an act within the scope of such authority, and that on the construction put on the bill of exceptions by the majority of the Judges, these thorns were so left, and therefore there was evidence of a conversion by defendants. Parke B. was of opinion that the implied authority of such an officer is strictly confined to acts within the scope of the Company's ordinary business, and that there was no evidence that Fisher had a more extensive power; that goods warehoused for a short time, as a custody ancillary to their carriage, would have been in the possession of the Company in the course of their ordinary trade, and to refuse to deliver those was within the scope of Fisher's authority; but that it was beyond the *prima facie* authority of Fisher to allow the thorns to be planted for an indefinite time for the plaintiff's convenience. Parke B. therefore doubted whether a refusal to deliver up goods so left was within

the scope of Fisher's authority, or would make defendant's liable; and therefore he did not concur in holding the direction right, not being satisfied that evidence had been given upon which a jury could find for defendants.

Maule J. was of opinion that the goods having once been in defendant's possession, it lay within the scope of Fisher's authority to deliver them up, whether in allowing them to be planted, he exercised his power or not; and further, that it was not beyond the *prima facie* power of Fisher to grant any reasonable accommodation to customers, and to allow the plaintiff's to store his quicks in the Company's ground till wanted, was not *prima facie* an unreasonable accommodation.

13. SIVEWRIGHT v. ARCHIBALD. 17 Q. B. 103.

Statute of Frauds, s. 17.—Contract for Sale of Goods of the Value of 10l. — Evidence of Contract by Broker's Notes — When different Versions given to contracting Parties.

This was an action for not accepting iron. The declaration, as originally drawn, set out a sold note, signed by a broker for the sale to the defendant of "500 tons Dunlop's pig-iron," and averring a breach of the contract on the part of the defendant in not accepting or paying for the iron when tendered. Plea, *non assumpsit*. It was proved on the trial that the broker, on behalf of the plaintiff, had, in February 1849, verbally agreed to sell the defendant 500 tons of "Dunlop's pig-iron," and had besides delivering the above note to the plaintiff, delivered a bought note to the defendant, which, on being compared with the sold note delivered to the plaintiff, varied from it in stating the purchase generally as of "500 tons of Scotch pig-iron." There was no entry of the contract in the broker's book, and it appeared in evidence that Dunlop's was a Scotch pig-iron; but there were various other makes of Scotch pig-iron known in the trade. After the notes were delivered, a negotiation took place on the defendant's part to forego the purchase. Several letters were put in, and verbal evidence given to show that both parties continued to treat the contract as a valid subsisting contract, without, however, advertent to the previous terms of it, neither party being aware of the discrepancy between the broker's notes. On the bought note being produced at the trial, the declaration was allowed to be amended, in order to agree with its terms; and the presiding judge (Lord Campbell) left it to the jury to say whether

the defendant had ratified the contract as set out in the amended declaration; and the jury having found a verdict for the plaintiff, leave was given to the defendant to move to enter the verdict for him, if the Court should be of opinion that there was not evidence to prove the declaration as amended. A rule *nisi* was obtained accordingly, and on the same being argued, the Court of Queen's Bench (Erle J. *dissentiente*) held, first, that there was a material variance between the bought and sold notes, and therefore that they did not constitute a valid contract; secondly, assuming that there was evidence of a parol contract, there was no sufficient memorandum in writing within the Statute of Frauds to make such contract binding upon the defendant. It was also held by Lord Campbell C. J., and Wightman J., that there was no sufficient evidence of any subsequent ratification, by the defendant, of the contract as stated in the bought note.

Mr. Justice Erle, in an elaborate judgment in which all the contracts made through brokers are reviewed, expressed an opinion that the defendant, having the right to return the note if contrary to instructions which was sent to him, "the keeping of the note made it binding on him, and not the signature." "In the greater number of cases," continued the learned Judge, "the doctrine that bought and sold notes are the sole evidence of the contract is not recognised; nor was the point decided that other evidence of the contract, and of a compliance with the statute, is inadmissible if bought and sold notes have been delivered, which differ, and if the principle is not established by direct authority, the manifest evil resulting from it is a strong ground for believing that it is not founded in law." The learned Judge further held that the defendant, having contracted to buy 500 tons of Scotch pig-iron, and having kept the note of the contract sent to him without objecting to its terms, the introduction of the maker's name in the sold note was an immaterial variance.

The rest of the Court held that the variance was material; that the plaintiff had assented to sell Scotch pig-iron of a particular make, whereas the bought note delivered to the defendant treated the contract as one for Scotch pig-iron of any kind. Such being the case, there was no binding memorandum of the contract proved within the provisions of the Statute of Frauds. "If this were *res integra*," Mr. Justice Patterson observes, "I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds; but I consider that point to be too well settled to admit of discus-

sion; yet there is no case in which they have varied in which the Court has upheld the contract; plainly showing that the two together have been considered to be the memorandum binding both parties." Lord Campbell, after commenting on the cases already decided, observes, "I by no means say that where there are bought and sold notes they must necessarily be the only evidence of the contract; circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book signed by him, I should hold without hesitation, notwithstanding some dicta and a supposed ruling of Lord Tenterden in *Thornton v. Meux* (M. & M. 43.) to the contrary, that this entry is the binding contract between the parties, and that a mistake made by him, when sending them a copy of it in the shape of a bought and sold note, would affect its validity." The Lord Chief Justice proceeds to deplore the serious consequences to commercial dealings caused by the remissness of brokers, in not pursuing their legal duty by entering every contract in the first instance in their books, making the bought and sold notes mere copies, and not the original memoranda of the bargain;"¹ and adds, "When there is no evidence of the contract unless by the bought and sold notes sent by the broker to the parties, I do not see how there can be a binding contract unless they substantially agree, *for contracting parties must assent to the same terms*; and when the terms of the two notes differ, there can be no reason why faith should be given to the one more than to the other."

¹ The Corporation of London, who derive a revenue from licensing brokers, have a variety of regulations by which the duty of entering every contract in the "broker's book," and delivering a true copy of such entry to both buyer and seller on request, is made imperative on the broker; but *no time is specified for the entry being made in the book*, and the mischief that ordinarily arises from careless memoranda, occurs on the very day of the contract being verbally concluded. The City regulations being therefore found inoperative, an action of negligence was brought against the broker by the plaintiff in the above case, and damages recovered to the extent of the plaintiff's loss by the contract going off, and the costs incurred in seeking to enforce it. See *Sivewright v. Richardson*, reported in "Law Times," vol. xix. p. 10.

POSTSCRIPT.

THE SESSION 1854.

THE alarm which we felt that the war, unhappily become as necessary as it is just, would for a season occasion all measures of internal improvement to be suspended, has in some respects proved well-grounded, but in others has been dispelled. On the one hand, many plans of great importance for the amendment of the Law have been brought forward, as many to the full as if we were living in times of profound peace; but, on the other hand, these have commanded far less attention, either from Parliament or the country, than their merits entitled them to, and there is every reason to fear that their success will be rendered difficult, if not impossible, until the excitement of the war shall be calmed, and the excuse for postponing all but measures of a peculiarly pressing nature shall be taken away from the Government and the Legislature. It is, however, by listening to this topic, by taking advantage of this excuse, that the state of war becomes more calamitous, and that we foolishly and unnecessarily make that a great deal worse which is of necessity bad enough. It is fit that we cast our eye over the measures of Law Amendment which have been brought forward in these circumstances.

One of the most important is Mr. Crawford's Bill to make Judgments and Decrees pronounced in one part of the United Kingdom available in all other parts. At present, if a party obtains judgment in Scotland, he can only obtain the fruits of it in England by bringing an action upon it, and obtaining an English judgment in that action; he cannot have execution without this new judgment.

Mr. Crawford's Bill was received with universal approval by the Crown Lawyers of England, Scotland, and Ireland; and there can be no doubt that any technical difficulty will be speedily overcome in the Select Committee to which it

was referred. We can see no reason whatever for not extending the provisions of this measure to Probate, Letters of Administration, and Confirmation (the Scotch probate and administration). Petitions have been presented from mercantile bodies in both parts of the United Kingdom for such an improvement of the Law, and the only reason given for refusing their prayer,—namely, that the law is different in Scotland and England, and the practice also differs, though not the law, in Ireland,—would go at once to the necessity of rejecting the measure which relates to other judgments and decrees; but it would indeed go a great deal further; for it would afford a ground for refusing to let the party who had obtained a Scotch or Irish judgment, sue upon it in our Courts, as well as to prevent him from having execution upon it in England. No doubt where the law and course of procedure in a foreign country is so entirely different from ours that a person may obtain judgment behind his adversary's back, means should be taken to prevent such a judgment from being conclusive, and the Courts have refused to consider it as binding at all (*Rucker v. —*, K. B.). But in the practice of Scotland, where decrees in absence may be obtained liable to be set aside on the party coming in, the judgments in absence are distinguished from those *in foro*, and the execution should be confined to the latter, as on proof of the diversity the conclusiveness would be confined in actions under the existing law.

Mr. Aglionby has introduced a Bill of great practical use, for enabling prisoners charged with larceny to plead before Justices at Petty Sessions, and also before police magistrates; so that if after due warning of the consequences they plead guilty, they may be sentenced at once, instead of being detained till the Assizes or the Quarter Sessions, and thus the expense be saved of preferring indictments and carrying witnesses, as well as the time of the grand jury. It was found in the County of Cumberland, that from a third to a half of those against whom bills were found pleaded guilty on their arraignment. Lord Campbell, in reference to this subject, expressed a strong opinion against the present course of proceeding, by which Judges at the Assizes have to try so many

offences, which though in the eye of the law larcenies, are really only trespasses.

One great opprobrium of our law seems about to be removed in consequence of a Bill introduced by Mr. Bowyer, whose great learning well qualifies him to deal with this subject,—we refer to the Action for Criminal Conversation. He proposes to treat adultery as a misdemeanour, punishable by fine and imprisonment, and to give the wife a right of appearing and being defended in both action and prosecution. That there will be great difficulty in framing this measure is unquestionable; and it is very possible that Mr. Bowyer's Bill may not pass in its present shape. But it seems hardly possible that it should be fully considered without a material change being made in the law as it now stands.

An excellent measure has been introduced by Lord Harrowby,—a Bill for requiring the Registration of Bills of Sale, in order to give them effect over the property of the Conusor. This is only an extension, but a most beneficial one, of the former law requiring Warrants of Attorney to be recorded. It has been suggested that instead of requiring the registry in the Courts of Westminster, these instruments might be recorded in the County Courts; and thus parties wishing to ascertain the circumstances of their debtor, might more easily do so by inquiring each in his own neighbourhood than by sending to London.

The important subject of a Public Prosecutor has made considerable progress during this Session. Mr. Phillimore has brought in a Bill upon the subject, and in the Lords a discussion took place on two occasions. Lord Brougham stated that a plan for gradually introducing such a functionary had been arranged by the Government in 1834, and that if the Government was now disposed to take up the matter, he had no doubt Mr. Phillimore would allow it to be in their hands; but that he hoped that gentleman would persevere in his Bill for the purpose of securing the attention of the Government to the subject. Lord Campbell entered at some length into the case of Scotland, and expressed his doubts as to the expediency of a general measure; but he admitted the force of the arguments in favour of such an improvement in our

criminal procedure, and hoped that the difficulties which stood in the way of it might not be found insurmountable.

Lord Brougham has again introduced the Arbitration Bill of last Session, with clauses, giving a compulsory power to the Court of referring matters of account; and the Scotch Bankruptcy and Insolvency Bill, so much called for by the mercantile body in both parts of the United Kingdom, as we had occasion to show in our Number for last August. It was received with great favour by the law lords, as was his other Bill, now first introduced,—that for extending to England the admirable provision of the Scotch law, by which the holder of a bill of exchange or promissory note obtains execution in six days, unless the debtor (acceptor, drawer, or indorser) can satisfy the Court by a summary proceeding that the execution ought to be stayed. It appears that of the protested bills not above one per cent. are ever made the ground of such application, and probably not above one in ten of the applications (termed suspensions) to stay execution are successful. It is not easy to estimate the benefits which would result from the adoption in England and Ireland of this most just and salutary law under which the commerce of Scotland has flourished and has increased in a degree, perhaps, unparalleled in the history of nations. This is not the only proposition for importing from Scotland improvements in our jurisprudence, while we are, as in the Bankruptcy Bill, giving our northern neighbours the benefit of our own legal reforms. Another Bill has been presented by Lord Brougham, and referred to the Chancery Commission; it introduces into England the declaratory suit, the want of which successive Chancellors have so often lamented, and which he had by the same Bill proposed to introduce in 1845. Two other Bills have also been presented by him, one of which we shall refer to in some observations on a Minister of Justice,—that for extending to all instruments the rule of professional remuneration enacted in 1845 for conveyances and leases; the other has been passed through the Lords, and cannot but be carried through the other House immediately,—that for curing the defect which found its way into the Act of 1850, for extending the jurisdiction of the County Courts, and in conse-

quence of which the Court of Exchequer held that there lies no appeal where the suit is brought under the optional clause. The oversight in transferring to that Act the provisions of the Bill of 1833, occasioned this determination which has greatly tended to cripple the action of that salutary clause. Every one perceives at once that there is more occasion for giving the benefit of an appeal in the more important cases, and that parties will be reluctant to try before the County Court if they have not the same advantage as before an Arbitrator, in being able to take the opinion of the Court above on questions of Law.

: Adverting to the number of Bills which he had this Session introduced, Lord Brougham stated that he had refused to present many more than six, when strongly urged by experienced persons and by bodies of men suffering under the defective state of the law. But he added that there was great encouragement in the reflection that in 1845 he had introduced nine Bills, the majority of which, in point of number and in point of value nine-tenths at the least—had since been passed, and were now the law of the land, including the Bill for examining the parties in all suits and other proceedings. Another of these nine Bills was that on Declaratory Suits, now brought in again; the one for securing the real independence of Parliament by extending to non-traders the provisions of the Act of 1812 as to traders having seats in the House of Commons, he held it unnecessary to renew, as the subject had been taken up in that House, which was most fit to deal with the subject. It gives, certainly, a very comfortable assurance to friends of Law Amendment to see so many important improvements carried which when propounded were deemed hopeless; so that Lord Bacon's saying was verified,—how sure good proposals for the amendment of the law were to produce in time good fruit, how little soever they might appear to be hopeful at the first.

We grieve to say that he had no success whatever in obtaining from the Government the relief of the County Courts in respect of the taxes so unjustly, indeed so absurdly, imposed upon their proceedings. It is nothing less than shameful

and scandalous that while the Superior Courts are almost entirely supported from the Consolidated Fund, only 50,000*l.* being levied by fees upon the proceedings there, the County Court expenses are wholly paid by the suitors, 275,000*l.* being levied in fees upon their proceedings. Seventeen per cent. on the sums sued for, above thirty per cent. on the sums recovered, are thus exacted. Many instances have been produced of far greater pressure on the suitor: cases have been cited of 7*l.* and upwards paid in Court fees where the suit was for less than 15*l.*; nay, 8*l.* where the sum sued for was only 5*l.* But though these are extreme cases, and the average is as above stated, it is manifest that the system is worse than that average would show it to be; because no one pretends that the fees have not been lawfully exacted by the officers of the Courts, and though accidental circumstances may have caused so extraordinary a multiplication of steps of procedure as gave rise to such an amount of fees being due, the system is utterly intolerable which enables the State to levy in any case, and under any circumstances whatsoever, such exorbitant fees on those who resort for justice to its Courts. The Government could not deny this, but gave the accustomed answer,—that the subject would be considered, and that it would be necessary to go at large into the whole question of judicial remuneration—as if this were not an insulated matter, a grievance standing by itself; and as if any thing could justify the suffering it to continue a day after its existence was admitted. The lowering of the fees in the Superior Courts has actually attracted business thither, and prevented the continued increase in that of the County Courts, which in one year had augmented by above 30,000 suits. The County Court Commissioners, some months ago, reported to the Great Seal a resolution unanimously adopted in favour of paying the salaries of the Judges and expenses of the buildings by the State, and not by Court Fees. This would relieve the County Courts to the extent of 125,000*l.* a year, and would leave them still burthened with three times as much as the suitors pay in the Courts above. And there cannot be any reasonable doubt that the increase of business would reduce to a much smaller sum the burden

thus thrown upon the Consolidated Fund. Yet all these considerations were of no avail, and a grievance which no one pretends to deny must go unredressed, though it is the bounden duty of the Government not to oppress the suitor for whom it affects to provide the means of having justice administered to him.¹

MINISTER OF JUSTICE.

NOT only there passes no Session of Parliament without affording remarkable proofs that the creation of a Minister of Justice is absolutely necessary for the improvement of our jurisprudence, more especially of our Judicial system, but hardly is there a month of any Session that does not furnish striking illustrations of the evils resulting from the want of such a functionary. It is in vain to insist that we have him in the Lord Chancellor. Unless that high officer were to give up sitting in the Court of Chancery and in the judicial business of the House of Lords, devoting himself to the superintendence of whatever regards the profession of the Law, and the legislative duties of Parliament, and being thus responsible for whatever in connection with those departments belongs to the Executive Government, we can only be said to have the name of Minister of Justice without the thing. There is no one to whom the Country can look as answerable for faults and for neglects in the most important of its affairs, its Judicial system, and the measures required for the amendment of its laws. The Lord Chancellor is only acci-

¹ The Government papers have defended their patrons by a misstatement of a nature so gross that it may safely be pronounced to be without any example. They have actually charged those who complain of the Court Fees and demand the relief of the County Court Suitors, with hostility to the County Courts, with dwelling upon the expenses of those Courts, and with placing the process of the Superior Courts in an invidious comparison! This ignorance and want of reflection,—such alone we believe it to be,—seems wholly incredible. It is as if persons complaining of the price of newspapers being increased by the stamp, and calling for a repeal of it, were to be charged with hostility to the newspaper press, and with setting up unstamped tracts invidiously against stamped newspapers.

dentally, and occasionally, and, indeed, partially the functionary in question.

As an instance of this, we may cite the most important of all patronage—that of appointing to Judicial offices. He names some of the Judges, but not all. He recommends the Puisne Judges and the Chief Baron, and takes the Royal pleasure on their appointment without consulting his colleagues,—a most wholesome rule for the purpose of guarding against the influence of political motives. But the Lord Chief Justices are recommended by his colleagues in conjunction with him. He appoints the County Court Judges and the Judges in Bankruptcy, but the Insolvent Court Judges are appointed by the Home Secretary, as are the Recorders since their nomination was taken from the municipal bodies and vested in the Crown. The Colonial Judges are all appointed by the Colonial Secretary; the East Indian Judges by the President of the Board of Control; and the Judges of Scotland by the Home Secretary; advising occasionally with the Lord Advocate, as he and the Colonial and East Indian Ministers may advise with the Chancellor—which, however, they rarely do unless perhaps to ask if there is any objection to the person recommended, and who accordingly too often obtains his promotion for party services or through party connexions. We merely give this as a proof how little the Lord Chancellor can be said to fill any thing like the place of a regular Minister of Justice; and it is very far from our design to show that improper appointments have been the result of this divided responsibility and crippled authority. Other illustrations have too often been afforded of the errors arising from the defect complained of, to make it necessary that we should have recourse to any such personal topics—not to mention that here, as in so many other instances, the checks upon the undue exercise of patronage prevent a bad or imperfect system from producing anything like the amount of mischief which might naturally be expected to grow out of it. But other evil effects of the vice, or imperfection in question, may be cited in cases of constant occurrence.

The subject has never undergone a regular discussion in

Parliament, but it has occasionally been broached, especially in the House of Lords. Lord Langdale once and again pronounced a very strong opinion upon the necessity of such a department, and declared that without it, not only great evils must arise in the conducting of our judicial affairs, but there could be no prospect of the necessary improvements in our system being undertaken, and if attempted, no security for their being well devised or effectually carried into execution. Lord Brougham has frequently shown how greatly our Legislation suffers from the want of a Minister of Justice; and on one or two occasions during the present Session, especially just before the Easter Recess, he debated this subject, and showed in some detail how the public interests suffered from the defect. Let us observe how in practice this is illustrated, both by the cases cited and by others which might have been referred to with the same view.

A very important addition was made in the last Session to the Law of Evidence. The omission in Lord Brougham's Act (1852) respecting husband and wife was supplied, and the exception being repealed, they became admissible as witnesses in all causes. But in what way was this measure passed into a Law? No objection whatever was made to the Bill in the House of Lords; it passed without a dissenting voice through all its stages; it was sent down to the Commons, and it being nobody's business to take charge of it, there being no department to which it belonged, nothing was done. Every one in the House of Lords naturally took for granted that it had passed, and it was only found to have been forgotten when too late to pass it before the Circuit; so that all the causes were tried all over England and Wales under the old and defective law, the Act for the correction of the universally admitted error only coming into operation three or four months later. What made this state of the Law still more to be lamented, was the circumstance of a Bill having passed for Scotland extending to that part of the Kingdom the Act of 1852, without the exception as to husband and wife; so that the Scotch Law for some months was free from a great practical imperfection which continued to exist in our English Law of Evidence. Had there been a department answerable

for such Bills being attended to, this never could have happened.

Lord Eglinton lately complained, and most justly, that the Act which enables parties who in England or Ireland take Probate of a Will, or obtain Letters of Administration, to proceed against the Railway Shares of the deceased in Scotland without taking Administration there, does not give the same privilege to a Scotch Administration in respect of Railway Shares in England or Ireland; but the Executors or Administrators in Scotland are driven to take Probate twice in England (in Canterbury and York), and twice in Ireland (Dublin and Armagh). There were, in fact, two Railway Clauses Acts passed, forming two consecutive chapters; and the section containing this matter was copied from the one to the other, but with the omission, in the Scotch Act, of the words in the English Act that give the English Probate force in Scotland. Had there been a department charged with the duty of watching such Bills, this important error never could have been committed.

In our Number for last August we pointed out another very great, and, in its consequences, very injurious oversight, when stating the grievances of which our Scotch fellow subjects complain. The abolition of arrest for debts under 200*l.* Scotch (8*l.* 6*s.* 8*d.* sterling) in 1835 was most ruinous to retail dealers, because it was unaccompanied with the safeguards which the experience of a single year showed to be absolutely necessary when a similar change in the Law was made in England. Those safeguards were forthwith provided for; but though nineteen years have elapsed since the Scotch Act passed, nothing has yet been done to relieve the trader. The consequences of that Act were such that whereas previously the bad debts amounted to only 20 per cent. in those small dealings, the year after they rose to 80 per cent.

The cases to which we have referred are those of manifest oversights, which the existence of a department charged with the care of our legislative proceedings must have prevented. But the same defect in our system has a yet more hurtful tendency to obstruct its improvement, by delaying the adoption of salutary amendments in the law. There is no one now

charged with the duty of propounding these, or of considering the propositions made by individuals, or bodies of men, selecting such as after mature deliberation deserve the support of the Government, and sparing the Legislature the trouble often given by crude and ill-combined schemes that are pressed upon its attention. No one who reflects on the history of Law Amendment for the last twenty years can fail to perceive how greatly its progress has been retarded by the want of the department of which we are speaking.—To begin with the most remarkable instance, the great change which has lately been effected in the Court of Chancery, by the abolition of the Masters' office. That measure was distinctly propounded, and the reasons for it urged in 1842, by Master Brougham, in a letter addressed to Lord Langdale, who had by Lord Lyndhurst's desire called upon the Masters to give their opinion upon the evils complained of in Chancery Procedure and their remedy. The Master stated, that after eleven years' experience he had arrived at the conclusion, for which he gives his reasons, that there was but one effectual remedy, the making the Judges work out their own decrees, and getting rid of the Masters' office entirely; and he showed how this might be done; but, he added, that if the measure seemed too bold, and the Masters must be retained, it seemed possible to make some improvement in the procedure by giving them original jurisdiction in certain cases and under the control of the Court. Lord Langdale agreed entirely in the proposal of abolition, and expressed his willingness to take his share, should the plan be adopted, by working out his own decrees, as was proposed, sitting sometimes as a Judge in Court, sometimes as a Judge (or Master) in Chambers. It is understood that Vice-Chancellor Wigram, to whom, jointly with the Master of the Rolls, the subject had been referred by the Chancellor, took the same view of Master Brougham's plan; and if there had been a department charged with the consideration of such proposals, there cannot be a doubt that in the course of that or the next Session of Parliament the measure would have been adopted which, for want of such a department, was delayed till 1852. The proposal was made in February, 1842, as appeared when the Master's letter was

given in evidence before the Lords' Committee and the Chancery Commission, in 1851. Failing to obtain the full and effectual remedy, the friends of Law Amendment endeavoured to pass the less effectual measure which Master Brougham had proposed as better than nothing, and which he recommended in a published letter to Lord Cottenham, in 1847. The Judges Masters' Bill was accordingly brought in by Lord Brougham and it passed the House of Lords; but Lord Cottenham, whose unhappy prejudice in favour of the Court of Chancery as it existed, made him averse to all change, exerted his influence to have it rejected in the Commons; and another attempt being made in 1851, when Lord Truro had succeeded to the same office and the same prejudices, the Bill was postponed till next Session—and fortunately then the greater measure propounded in 1842 was passed, and the greatest of all the improvements that have been made in Chancery Procedure was at length effected; but, after the suitors had suffered for ten long years the needless misery, and the Court the needless disgrace, of the system now universally condemned. It is to be observed that there was no evidence given in 1851 and 1852, either before the Lords' Committee or the Chancery Commission, which had not been given in the proposal made to the Master of the Rolls and the Vice-Chancellor in 1842.

The Acts which were passed in 1845 for facilitating the transfer of real property afford a similar instance of the needless delay in adopting measures of Law Amendment. Mr. J. Stewart had in 1842 described the evils and propounded the remedy in a work upon the subject. It may not perhaps be reasonable to complain of the interval between that publication and the passing of the Acts, because it is but short compared with the further delay which has occurred to prevent the complete adoption of the most important of Mr. Stewart's suggestions—the remuneration of professional services not by the length of the deeds or other instruments prepared, but in proportion to the labour and skill bestowed. The reason why we consider this as more important than the shortening of conveyances by furnishing concise forms, and leaving the draftsman to adopt these or continue using the

prolix ones, is this:—the remuneration being by length would in general prevent the adoption of the short forms, and the principle is also applicable to other cases where no short forms can be given. The change is fundamental, and of extreme value in all conveyancing; it avoids prolixity, but it also lessens the chances of error, which must be in proportion to prolixity; it encourages learned and skilful preparation of instruments; it prevents the attorney from loading his brief with useless matter in order to obtain his fair remuneration; it saves the client the charge necessarily made by increased fees to counsel which are given in order, not that the counsel should be paid, but the attorney. The Bills which passed in 1845 confined this important provision to the instruments therein dealt with, deeds and agreements for sale, mortgage and lease. In 1849 a Bill was brought into the House of Lords by Lord Brougham, and passed without opposition, extending the same provision to all instruments and all writings whatever, deeds, wills, agreements, memoranda; but it was thrown out in the Commons, because the Government, though they supported it, had not made it a measure of their own, and one of the Crown Lawyers opposed it. Next year it was brought into the House of Commons by Mr. Headlam and Sir W. Page Wood, now Vice-Chancellor; but it was dropt upon some opposition threatened from the same quarter. It has been again brought into the Lords and universally approved; the Lord Chancellor and Lord Chief Justice declaring, that if it could be made effectual it would effect the greatest possible improvement in our whole legal proceedings. They only expressed a doubt how far it could be effectual. But the answer to this is that discretion must be lodged in the taxing-officer, and that at present he has none but must go by the length merely. If he is fit for his office, he must be able to form some estimate in each case of the difficulty overcome by the draftsman, and the value of his skill and labour. Those officers are understood to feel severely the pressure of the existing rule which compels them to pay for mere mechanical labour as much as for the most skilful. The Bill in all probability will now pass, and a very great benefit will accrue

both to the client and to the Profession; but it is twelve years since the same advantage might have been secured, had there been a department to take up Mr. Stewart's most valuable suggestions!

We could multiply instances of the same kind, all tending to show how much the Public, as well as the Profession has suffered by the want of a Minister of Justice. The answer given on the late discussion to Lord Brougham, that he might act as *Chargé d'Affaires* till a Minister should be appointed, is wholly beside the question; indeed his continuing so to act may be exceedingly hurtful if it is to prevent the fit course being pursued.

CAPITAL PUNISHMENTS.—SPIRITUAL MINISTRATIONS.

It is admitted on all hands that the only justification of capital punishment is to be found in the assumption of the tendency of example to deter from a repetition of the grave offences for which it is inflicted. If, however, the exhibition of that punishment is accompanied with circumstances which greatly weaken, nay, almost counteract, that deterring tendency, the question arises whether or not those circumstances can be precluded, can be dissociated from the penal infliction; and, if they cannot, whether recourse must not be had to other punishments free from such counteraction. A late remarkable scene in the sister kingdom very naturally gives rise to these reflections.

About two years and a half ago, a barbarous murder was committed in the county of Monaghan, the result of deliberate conspiracy, and attended with savage cruelty. Two men being arrested on suspicion, were tried, and from the carelessness with which witnesses in that country too often swear, very narrowly escaped conviction—happily as now appears, for they certainly were innocent of the crime. Three others were lately seized, and after a very full and patient investigation were convicted on evidence that left no doubt of their guilt, and were executed in front of Mona-

ghan gaol. Being of the Roman Catholic persuasion, the Bishop appears to have bestowed peculiar pains upon their case; for three clergymen were appointed, one for each, who ministered to them during the whole interval between their trial and their execution. They protested their innocence while in prison; being asked if they intended to address the multitude from the scaffold, they said that much depended on the advice their priests should give them: they, however, said nothing except as to their hopes of salvation; from whence it is to be inferred that their ghostly advisers did not counsel them to renew in public their protestations of innocence. As absolution had been given to them, we may conjecture that confession had preceded it; and it does not appear that any efforts were made to obtain a commutation of the sentence. The probability therefore is, that the clergymen were aware of the deep guilt under the load of which the consciences of these vile convicts lay; and they must have witnessed their going to the scaffold with all the pride of conscious innocence and the exultation of martyrs, as well as the confident expectation of eternal happiness, more lively and more undoubting than the most virtuous of frail human beings is justified in cherishing.

These men and their relations are represented as having been in a state of mind the very reverse of sad and sorrowful on the approach of their execution. Not only were no tears shed at their last interview with their families, but whoever expressed any sympathy and feeling for their condition was chid, and informed that there was ground for joy and not for grief. A visitor of the prison having said he was sorry to see three men in their position, was answered with "Sorry! why, it is glad you should be, sir." Another, being asked if he had any statement to make, replied, "No. Our Saviour said nothing when he was executed." The last rites of the church were administered to them in the chapel, and the procession immediately began to the scaffold, the convicts in their grave-clothes. One of them, seeing his priest pass a little way before, "ran after him, skipping like a school-girl, threw his arms round the priest's neck, and drew him on in a lightsome, hurried pace for a short distance." Some prayers

were read. "Hell cannot now scare us," said the wretched man. The executioner pinioned his arms. "He's doing the best job ever was done for us," was the remark made. Both the priests then gave their blessing; and one of the reverend gentlemen then added: — "Remember the penitent thief on the cross. In one minute you'll be in heaven. You have eternal happiness within your reach." "Mary, Mother of God! receive us; prepare heaven for us!" was the response. It is not necessary here to discuss the nice and delicate question, how far spiritual advisers ought to go in giving assurance of pardon for sin. But one thing seems clear enough; if the most positive affirmation of pardon as absolutely certain, is publicly made, in connection with a grievous offence known to have been committed, the effect on the minds of the spectators must be somewhat like that of a general impunity declared for all crimes of the like nature, as far as regards the religious sanction. But when to this is added the spectacle of the condemned criminal, not merely comforted, but happy, revelling in joy, showing the same flow of high spirits as if he had obtained, or was on the point of obtaining, the greatest conceivable happiness—it is not to be doubted that many a person who has witnessed the scene will feel his reluctance to perpetrate crimes greatly diminished, and will be disposed to yield, if led into temptation, when he sees that the scaffold, far from being a place of horror, is strewn with flowers, and eternal felicity the lot of the most atrocious criminals, who pass to heaven through the gallows, the gate to Paradise.

It is far from our wish to prefer any complaint of the course pursued by the priests upon such occasions. Theirs is a position of peculiar delicacy; but however necessary they may deem it to afford the consolations of their faith in private, surely they have no vocation to make the exhibition of capital punishment the scene of their own triumph over the fear of death, and to hold out each culprit who pays the forfeit of his crimes as a proof how safe from future sufferings are the flock committed to their care. It is impossible that they can gain respect and influence except at the expense of the law and its terrors.

There seem but two ways of meeting this mischief. Some have proposed private executions, which the American laws sanction. To this many grave objections present themselves. But certainly care might be taken by the magistrates and the keepers of gaols to prevent all access of the public, and render such scenes as have been adverted to impossible to be witnessed, except by the officers of the prison, confining the presence of the public to the moment of execution. The abolition of capital punishment is the only other remedy, and how great soever might be the evil of adopting that course, the repetition of such outrages as we have been contemplating may well occasion a serious consideration of it.

THE JUDGES AND THE CRIMINAL CODE.

WE should add to the remarks elsewhere made on "The Judges and the Criminal Code" one word on the remarkable concurrence of sentiment everywhere felt respecting the indiscreet reference to the Judges, and their manner of meeting it. The two Great Reviews—the *Edinburgh Review* and the *Quarterly Review*—the organs of views generally so opposite, are in accord upon this important matter, and the particular observations they make upon the subject matters of the reference, and the special mistakes which the Judges have fallen into, are every way worthy of perusal, and the serious consideration of all parties concerned.

LEGAL CHANGES.

THE seat on the Bench, created by the lamentable death of Mr. Justice Talfourd, has been filled by the promotion of Mr. Crowder; and the vacancy thus created in the post of

Recorder of Bristol by the appointment of the Attorney-General, Sir Alexander Cockburn.

INNS OF COURTS COMMISSION.

WE understand that this Commission is on the eve of completion, and may shortly be expected to issue.

THE

LAW REVIEW.

ART. I. — THE MONTALEMBERT CASE.

SINCE the affair of the Orleans property, perhaps no act of the present Government in France has produced a greater sensation, or united more persons of various opinions in one feeling whether of disapproval or of regret, than the demand addressed to the Legislative Chamber to sanction legal proceedings against one of its members, M. de Montalembert. A private letter written by one individual to another, sent through the post, uncommunicated to any third party (at least, no proof can be adduced of any such communication) by the writer, is the *corpus delicti*. The opinions contained in this letter form the alleged ground for arraigning a French gentleman and Member of Parliament before a Court of Justice as guilty of “an offence against the person of the Emperor, of exciting hatred and contempt in men’s minds against the Government, and thereby disturbing the public peace.”¹ Upon this statement it is demanded of a body of Legislators, one of whose most precious privileges is averred to be their power of defending their component parts against all aggression, that they shall give up to the jurisdiction of the ordinary tribunals one of their colleagues, and by so much diminish their own right of resistance to encroachment. The matter was speedily judged in public opinion, and, “who among us then is safe?” was the question rising

¹ *Annexe au proces verbal de la séance du 1er Avril, 1854. N°. 84. Rapport de M. Perret à la Commission.*

at once and spontaneously to all lips. The precedent was also looked upon as a highly dangerous one by most of the deputies; and no doubt had M. de Montalembert shown himself but a little more moderate in his defence, if he had not by the vehemence of his speech forced, as it were, the whole *Corps Législatif* to regard itself as included in the animadversion he had pronounced upon the Government, it is probable that a vote favourable to his cause would have been the result. As it was, the Assembly voted under the impression of the moment, and the *autorisation de poursuivre* was accorded by a large majority, only forty members protesting against it.

This affair has made so considerable a sensation throughout Europe, and is still in many of its parts so surrounded with mystery, that perhaps our readers may not be sorry to see its various details set forth categorically, and to have some information upon the principal party concerned. Our rule being ever to avoid purely political discussion, and, above all, keep clear of anything approaching to party spirit, we should have wished to confine ourselves solely to the judicial part of the question; but this is almost impossible when treating a subject connected with French legislation. In France the division of authority has never thoroughly existed since the Revolution of 1789, and it has scarcely ever been given to the observer since then to watch the natural development of any French Institution according to its own laws alone, uninfluenced by the action, direct or indirect, of the Government. "*L'État!*" the State, unfortunately interferes at every turn, and you may trace its progress every where, in the Land, in the Church, in the domain even of Art; every where provoking that explosion of party spirit happily unknown in other countries, turning into political discussions what ought to be merely special and technical questions, and (as the successive revolutions of sixty-five years have proved) equally impeding the healthy growth of liberty and shaking the stability of power. Having therefore duly established the difficulty of avoiding any allusion to politics while examining a question of how circumscribed a nature soever, in France, we will proceed

to recount the "*Affaire Montalembert-Dupin*," as it is called by our neighbours, in some of its minuter points.

In the summer of last year (1853) M. de Montalembert and M. Dupin, being together in the former's château, a conversation took place between them, in which, consistently with the opinions he has all his life professed¹, M. de Montalembert defended the cause of the *noblesse* against the *bourgeoisie* and the people. M. Dupin, strange to say, instead of differing from him entirely, agreed to many of his views, and, little by little, led away by his own discourse, ended by going further than his adversary upon his adversary's own ground. Pleased, though no less surprised, at what he thought his conquest, who shall paint the consternation of M. de Montalembert at reading in the *Moniteur* of September M. Dupin's singularly bitter speech to the *Comice Agricole* of Clamecy, in which he disowned all the opinions to which so shortly before he had seemed to be converted! Two things, above all, were calculated to shock the reader in this allocution so soon to be commented upon throughout all France; first, the deliberate manner in which it separated class from class, and sought to inflame the hatred of the lower against the higher orders; and next, the sudden respect and admiration which it breathed towards the man whose most arbitrary and unadvised act had been stigmatised by the very same orator *le premier vol de l'aigle*.

"Serfs, boors, mere victims of taxation, called by every name most contemptuous and most abject through succeeding centuries, our history has beheld you subjected to every humiliation, to every exaction, to every tyranny, and unable, even in the wretched privacy of your miserable dwellings, to contract marriage without the permission of your masters, or transmit to your lawful heirs whatever might be the amount of your hard-earned gains! . . . This is for you the *ancien régime*!"

Here is one of the more moderate of M. Dupin's phrases,

¹ One of the first (apparent) anomalies in the character of this celebrated "fils des Croisés," as he once styled himself publicly, is his anti-monarchical tendency: — "I am no Royalist, I am an *Aristocrat*," was a favourite phrase of his.

and the rest of the speech proceeds to show the *people* everywhere struggling against the "oppressions" of the higher orders, and finding their only advocates and protectors in those illustrious *parvenus*, who from time to time rose from their own ranks to authority and power. "I am not the chief of the army only," repeats the famous orator, adducing this sentence as a proof of Bonaparte's love of the French nation, "I am the Emperor of the peasantry of the *plebeians*; between them and me there is *identity of nature*, I am their support against the pride and heartlessness of the sometime privileged few (*les anciens privilégiés*)."¹ Napoleon I., as we may easily guess, serves merely in this case to introduce the panegyric of Napoleon III., and with what must in his mouth always sound as strange praise, M. Dupin closes an harangue, the principal effect (we will not say aim) of which was to envenom instead of obliterate class-hatreds, already productive of such direful consequences in France. Let us entertain whatever opinion we may upon M. Dupin's speech, —suppose us to agree with him in his violent abhorrence of all aristocracy, and exclusion of its members from all possible participation in the prosperity of the country, —still we can understand that others should differ from him, and above all we can, after what we have related, conceive the astonishment occasioned to M. de Montalembert by this discourse.¹ Seizing his pen he, on the spur of the moment, wrote to M. Dupin a letter — *the* letter — whereof the following is a literal translation: —

" La Roche en Brémy, 18th September.

" My dear *confrère* and neighbour,

" I received your obliging letter and your speech of the 11th. I had counted on speedily returning the visit you were so kind as to make us here, but I have to receive a whole series of relations and friends, some of whom come from the extreme confines of Poland; and besides that, I shall be forced to go to Paris, for an unforeseen affair. I must consequently defer till next year the

¹ Vide *Moniteur* of 14th September, 1853, for the "*Discours de M. Dupin au Comice Agricole de Clamecy*." Immediately after M. Dupin sent a copy of his speech to M. de Montalembert.

pleasure of going to see you at Raffigny and finish under your guidance my *études Morvanaises*.

"I was not invited to the *Comice Agricole*, and I confess to you that I am happy not to have been there in person. I should have been unable to hide my sorrow at hearing the President of the last free Assembly France ever had, become the echo of M. Troplong, flatter Democracy for the benefit of Despotism, and vaunt the *plébiscite* of the 20th December as the crowning conquest of 1789. In truth, the worst enemies of what you persist in calling the great and glorious Revolution of 1789 could not, in my opinion, insult it more grossly than by imputing to it as a natural consequence a system which condemns every intelligence to non-existence, every character to debasement, every conscience to silence or prevarication. Bacon's admirable axiom: 'The power to do what you will does not give the right of doing so' seems to me a strange preface to the praises of a constitution which expressly awards to one man alone the power of committing whatever he chooses, and hypocritically deprives every one else of the right of preventing no matter what! 'The present Emperor,' you say, 'who is always so attentively in accordance with the popular instinct,' (*la fibre populaire*); — now, popular instincts are of many kinds — there are good and righteous as there are perverse and detestable ones — witness those you have so well analysed in your *Histoire du Morvan*; and those which are aroused when the fat ones of the land are shorn, and Princes of France have their lawful and secular patrimony taken from them. In my idea, it should have been left to Delangle and his fellows to pay public compliments to a Prince who has re-established confiscation in order to discharge his debt of gratitude to the Royal Family whose intimate friend and counsellor you were.

"Forgive me the frankness of my remarks; but the perusal of your speech has grieved me, as an ex-colleague, as a *confrère*, as a Frenchman. What will become of us if those men who, under the rule of freedom, achieved authority and renown, now use both to foment bye-gone passions, re-animate obsolete discussions, and bear out in their false theories those sophists and scribes who proclaim us unworthy of liberty, and capable only of appreciating equality under the levelling rod of universal subjection? Must we then for ever perpetuate the remembrance of our worn-out disputes? Where is the use of these eternal recriminations against the nobility? Is the *noblesse* not sufficiently vanquished, nor humiliated nor crushed enough? We are now witnessing the

resurrection of the Lower Empire, but where is a symptom of the resurrection of feudality? and besides, *is history*, as you write it, *is it history indeed?* That famous night of the 4th of August, which you would with good reason make the high feast of the peasantry, was it not the spontaneous work of the *gentlemen* of the National Assembly? The Tullys, Liancourts, Montmorencys, La Fayette, were they not the true and sincere friends of the people? That the Magistracy of France has furnished immortal names to our chronicles, I admit; but, in return, from Louis XI. to Napoleon III., where has absolutism ever found more docile instruments, more cowardly flatterers, and, to say all in a word, more servile slaves (*de plus plats valets*) than among those men of law whom you call the sole defenders of justice and truth? If the nobility of France have always been wanting in *political* spirit, what did you not say to me in my own house hardly a month ago, upon the narrowness, exclusiveness, blindness of that *bourgeoisie* which thought it had triumphed in 1830? You then, in my mind, exaggerated its defects, but you gave me the conviction that it was high time to put an end, once and for ever, to our miserable divisions and our mutual disdains, to our separations profitable only to others, envy, and to all the jealous pretensions, the souvenirs and antipathies which are wholly without a pretext now-a-days.

"For my part, I recognise in France and in the entire Universe but two castes or classes: that composed of men of honour, intelligence, and energy, who revolt at wrong, and believe in freedom, conscientiousness, and the dignity of an honest man; and that of the base courtiers of power and success who deceive and domineer over the mob, using mere *mob-ocracy* as an engine to bring down legitimate superiorities of all species, and leading it on by the sole attraction of gross materialism and satisfied jealousy.

"Between these two castes I have chosen: I am well determined to remain for ever in the first, and am sorry to see you, even distantly, hold out your hand to the second. You were one of the Field Marshals of that Parliamentary army, where I served with you for some years, and whose banner is dear to me still. Under its folds I contracted the habit of saying what I think whenever the possibility for it occurs. Excuse, therefore, my philippic, which is the fruit of this bad habit, and believe no less in my cordial feelings, and high consideration.

"CHARLES DE MONTALEMBERT."

This letter, as we may see, bears the date of the 16th September. It was received by M. Dupin, and there are some persons existing who aver that he answered it by one of the most witty effusions of his pen, which, whatever its other faults, always does continue to be witty.¹ However that may be, nothing was heard of the correspondence until the *Journal de Liège*, on the 5th of December, printed in its columns M. de Montalembert's letter. Still, little or no sensation was excited by this publication, and upwards of three months passed over, when suddenly the *Indépendance Belge*, of the 16th March, brought again before the eye of the public the document destined to become so famous; perhaps we are wrong to say the "*public*," as far as France is concerned, for the paper was instantly stopped in its circulation, and it is said one only copy (that shown to the deputies in the *Salle des Conférences*) escaped suppression. A few days afterwards, hundreds of copies, on separate sheets of paper, and enclosed in envelopes, were distributed by the post to all persons of any note in Paris: generals, academicians, ecclesiastical deputies, all those who in political or literary life bore a name of any importance, received a facsimile of the letter, and as far as the *fact* went of publicity having been sought for and obtained, there can be no denying it. The fact of the delinquency in itself cannot be a matter for discussion,—but where was the delinquent? Before the end of the month a formal demand was preferred to the Legislative Chamber by the Procureur-General to give up M. de Montalembert to the free action of the law. But wherefore M. de Montalembert? Was he then the culprit? Had he deliberately put his own letter into circulation six months after it was written? The Procureur-General, (that is, the Government)² said, *yes*; the accused, said *no*, in

¹ It is alleged by some of those persons who pretend to know and to have seen everything, that M. Dupin's answer would offend the head of the State in France far more than M. de Montalembert's letter. According to these authorities, after jocosely depicting the quarrels of *bourgeoisie* and *noblesse*, M. Dupin adds that a third party reaped the benefit thereof, and he alludes to the Bonaparte faction most irreverently in the following line of La Fontaine's:

"Arrive un troisième larron."

² Baroche expressly says: — "Fearing lest there should be any error in the

the most positive manner, and utterly denied any communication of the letter, or any "*direct or indirect endeavour*" to make it known. Hence the discussion is, and here with the illegality begins that political interference of the State of which we have complained above, and which would seem unavoidable in all such cases in France.

The object meant to be attained by the privilege awarded to the Legislative Chamber of screening its members from any legal pursuit *during the Session*, is evidently the political independence of the deputy, his power of speaking and voting according to his conscience, and protection for him against the arbitrary measures of a Government that might at a given moment wish to secure the absence of such or such a hostile orator or voter. After all, when compared to the prerogatives of other bodies of the *State*, that of the Deputies is a small, being but a temporary one. It extends only over a limited portion of the year, whereas the immunity against pursuit of a Senator (unless delivered up by his colleagues) stands good for his whole life, and that of a Councillor of State for as long as he continues to hold his place. It is, therefore, difficult to comprehend that excepting in a most urgent, and one might almost say criminal case, the Government should persist in requiring the authorisation of the Chamber to pursue one of its members, unless we are forced to admit the promptings of political dislike, and the desire to suppress the political activity of an opponent.

The dignity of the Legislative Chamber, and the duty incumbent upon it of resisting the encroachments of the Executive Power, seem to us to have been deeply felt by the Committee formed to discuss the Montalembert affair, and prepare the *rapport* submitted to Parliament. The majority voted against the authorisation, and that for more than one reason. First, they voted in order to uphold the prerogative of the Legislative body; next, because the

way of representing the action of the Government in this case, I feel bound to declare that the *Procureur-General* acted according to the *free dictates* of his conscience, not upon the *formal instructions* of the Government!" This admixture of obedience and freedom seems to us not one of the least curious features of the whole affair.

Government-Commissioners, appointed to investigate the matter, refused to bring forward any, even the slightest, proof of the truth of their accusation, or the shadow of a reason why they should believe such accusation to be well founded; lastly, the Committee, by the voice of its reporter, declared that it was contrary to all precedent, as repulsive to all common feeling of dignity and honour, for a political assembly to proclaim its disbelief of the proffered word and solemn assertion of one of its members. M. de Montalembert had positively and repeatedly denied any participation whatever in the *publicity* of the letter, at the same time that he openly avowed himself to be its author. M. de Montalembert, it was said, ought to be believed, and if the law required discovery of the delinquent, why not search for traces of him elsewhere. Precedents were adduced to show that in all similar cases the word of the suspected person had been taken, when no positive proof existed to annul its force, and the example was quoted of M. de Cormenin's famous letter, printed with his signature in 1831, and the legal effect of which his mere denial of having really signed it sufficed to do away with.

In the open discussion of the Chamber (on the 5th and 6th of April), quibble followed quibble, and in the turnings and twistings of MM. Rouher and Baroche, the Government Commissioners, it is certainly difficult not to discover the alternate inventions, evasions, anxieties and hopes of men determined (because forced) to gain their point and carry off their prey. "The letter is not in itself (*per se*), the delinquency," affirms the Government, "it is the *publicity* of the letter alone that is a crime." Then, shortly after, perceiving the advantage likely to be taken of this admission, "Please to remark," says M. Rouher, "that in fact the *corpus delicti* lies in the letter itself—the publicity given to it is the *secondary element* of the crime." Here we have the rod held over the heads of those who thought to escape from their embarrassing position by anathematising the letter, yet absolving its author as innocent of attempting to make it public. One deputy, M. de Flavigny, courageously says:—"I refuse to vote for the authorisation, because it would be a vote of *complaisance* and not of conviction." Another, M. de Chasse-

loup Laubat, seems to us still better to strike the right nail on the head: "Why?" asks he, "did not the Government pursue the author or *revealer* of the letter when it was easy to do so, when the fact of Parliament *not* sitting rendered null and void the defensive action of the legislative body? Three months ago or two months hence, legal pursuit was and would again be the simplest thing possible. Why, therefore, undertake it at the only moment when it encountered any obstacle? Why? if not to force inseparability on the body-politic and its individual member?—to make the whole *Corps Législatif* responsible for M. de Montalembert's crime, (of which, then, it would naturally also accept the consequences), or induce it to declare its own abasement by servilely abandoning his defence and its own sacred rights?"

Most curious of all were the discussions upon the possibility of conciliating truth and falsehood, and reconciling belief of M. de Montalembert's *word*, and disbelief of the *fact* it attested. Memory was their last resource. They, one after the other, repeated that their confidence in the veracity of the accused party was unlimited, but might not his memory have betrayed him? Might not he—a man, in the full exercise of his brilliant faculties, and whom no one has as yet pretended to be insane, or subject even to occasional absences of mind—might he not, within the space of six months, have *forgotten* that he had made his letter public? or might he not have done so without meaning it?

This is the essence of the speeches of the more polite of the Government orators; and we must confess, that of all the various sentiments awakened in us by such arguments, that of amusement predominates—amusement at the conception such men must entertain not only of the elements of truth, but of the business-like habits and duties of a public man. Take it all in all, perhaps the most honest and sensible speech was made by an ultra-Bonapartist member, M. Belmoulet, a man who, as he said, had purchased the right of opposing the *State* on such a question by more than thirty years of blind devotion to the Bonapartist cause. He raised his voice manfully against the authorisation demanded, and added thereto that what he most dreaded for the Government to which he

had been attached all his life, was the misguided zeal of its friends.

Before the vote, however, Montalembert spoke, and truly, it may be said, with nothing diminished of the usual bitterness of his singular talent, or the vehemence of his character. Not a deputy who, at the end of his speech, did not feel himself personally attacked, as forming part of the race of functionaries so abused by the incriminated letter, and whose self-love was not mortally offended by the instinctive sentiment that the terrible word "*plat valet du pouvoir*," of the famous epistle to Dupin had been implicitly applied to himself.

It is superfluous to remark that those who have only read the speech in the *Moniteur* have no more idea of it, garbled as it is therein, than if they had made no attempt to know anything about it; but they who were fortunate enough to hear it will long retain a lively remembrance of the effect it produced, and the harshly superb eloquence it displayed. The followers of Montalembert recognised him whole and entire in this his latest improvisation, and, as on many and many a preceding occasion, the peculiar qualities of his oratorical powers cost success to the cause he defended. "You have lost your cause," said his friend M. de Flavigny to Montalembert, as he descended from the tribune; and of this he needed no assurance; but those who know the man know that a favourable vote, bought by silence, or a studied, insincere expression of his convictions, could not be compared for a single instant by him to the satisfaction of, at all risks, saying loudly what he had *sur le cœur*.

When the victory was gained the Government was perhaps more embarrassed by it than it would have been by a defeat, for it did not venture to follow up the proceedings for which the consent of the Chamber had been so hardly won. The judicial authorities betook themselves now to an active but hidden search for proofs. Who had read the letter? Who had received it? Where had it been listened to? On this road we may conceive that inquisition was unlimited; for the persons whose examination was imagined capable of throwing light upon the affair might be any of the frequenters of the "500

salons” in which the *Commissaires du Gouvernement* pretended the letter had been read. Consequently, this system did not long endure, and we believe we may affirm that the last of these interrogatories has come to its close. But while they were in process they gave rise to some diverting incidents, and none more worthy of repetition than the following: — M. Villemain, famous, for so many reasons, but for nothing more than for his *esprit malin*, was called before the Juge d’Instruction, and, with all due deference, questioned as to what he knew of the letter? “Nothing! absolutely nothing,” was the reply, “except that I have heard it most highly praised.” And this was uttered with such a convincing look of *bonhomie*, that the Judge was obliged to believe; besides, to aver the having heard such a frightful piece of sedition praised, argued, necessarily, ignorance. In the course of the examination, “How I should like to see the letter!” exclaimed, once or twice, M. Villemain, “I live so retired from the world and from politics” (this remark, made with the innocence and touching *naïveté* of a fox) “that I know nothing of what goes on — it is said to be a clever letter, very clever.” Moved by the humility and deplorable state of ignorance of one of his country’s greatest men (and an Ex-Minister, too!), the Juge d’Instruction fell headlong in the trap laid for him, and ended by reading with his own mouth the condemnation of the order to which he belonged, and the sentence against the Government he served, for the special edification of one of that Government’s most determined foes. When the *lecture* was ended, “I cannot thank you enough,” observed M. Villemain, “it is a very clever letter — I find it excellent — a most remarkably admirably-written letter,” and again he thanked the worthy magistrate, who to the end was not quite sure he had been taken in.

The real friends of the present state of things in France are, it need hardly be said, anxious beyond measure that the whole *affaire Montalembert-Dupin*, should sink into oblivion, and that its pursuance should not furnish a new pretext for hostility to those who pretend that the existing government can only exist by the absolute force of unjust and perpetual compression. The affair in itself has, however, drawn such uni-

versal attention to the name of Montalembert, that a slight sketch of the individual may not be unacceptable to our readers.

Charles Forbes Tryon, Comte de Montalembert, son of the late Count, and of Miss Forbes, his wife, is now but forty-four years of age, and, his years considered, and as far as the mere rhetorical part of parliamentary eloquence goes, he has perhaps no parallel in his own country, and, out of it, may be best compared to the younger Pitt.

Born in England, partly educated in Sweden, he returned to France in 1829 at barely twenty, and had scarcely accompanied his father into a few political *salons*, when every experienced eye had discovered his value. His appearance, habits, tastes, were all, as they are to this hour, aristocratical in the extreme; his opinions were all upon the side of liberty; he was a defender of democracy, and his first associates were the men who overthrew the monarchy of the Restoration. "That boy," said M. Guizot, in the commencement of the year 1830, pointing to young Charles de Montalembert, "is a hope for the rising generation." Little did he think what a terrible antagonist he was destined to find in the youth so lauded, and that, too, ere long. M. Guizot and his party, the *doctrinaires* and *liberals* of before 1830, were the first friends from whom Montalembert separated (and his life has been a series of separations), when, after the Revolution of July, he and the democratic school accused them of being the advocates of despotism. Montalembert's *début*, in his Parliamentary career, was in the character of an *accusé*, and he was ushered into the Chamber of Peers to answer the charges brought against him by that Chamber constituted *en Cour de Justice*. Immediately after the Revolution of 1830, a paper, entitled *L'Avenir*, was founded by MM. Lacordaire, de Cous, Gerbet, and Montalembert, under the influence and direction of Lamennais. The object of this paper was the furtherance of the Democratico-Catholic interests, and the establishment in France of pure Ultramontanism by revolutionary means. In April, 1831, *L'Avenir* announced the intention, on the part of its founders, of putting into execution their doctrines upon the freedom of public instruction

(one of the great unfulfilled promises of Louis-Philippe). On the 9th of May following, MM. de Montalembert, Lacordaire, and de Cous, accordingly opened a school, on the street-door of which was painted "*Liberté d'enseignement*," in large letters, and the object whereof was to secure religious instruction principally to the children of the poor. On the 11th of May, a commissary of police was sent to disperse the assembly, but was unable to do so, and on the ensuing days the municipal force was called in, and, turning out preceptors and children, closed the doors and put the seals thereon. The three persons arrested *flagrante delicto* were forthwith proceeded against before the *Cour Royale*, and condemned to the *minimum* of the fine instituted for commission of an offence against the Art. 56 of the Imperial Decree of 25th November 1811. They instantly appealed from this judgment, but, in the meantime, M. de Montalembert, senior, died, and his son, just arrived at his majority, became a peer of France, the hereditary peerage not being yet abolished. This took the cause out of the pale of the ordinary tribunals, to bring it before the special Court of the Upper Chamber; and on the 20th of September, 1831, M. de Montalembert and his two associates were arraigned at the bar of the *Cour des Pairs* on the charge of having "tried to corrupt the youth of France by inveigling them into an illegal act, and inviting them to seek instruction in an establishment whose first principle was revolt and disobedience to existing institutions."¹

How far we, as a free nation, can regard for an instant admissible the system of a government forcing *patented teachers* upon every family, and forbidding fathers to educate their children in their own way, and, above all, in their own creed, is a question to be examined. It is probable that the sentiment of most Englishmen would lead them to the side of the chief culprit in this affair; but that he *had* offended the letter of the law is an undeniable fact, and for that offence he had to stand his trial. The letter of M. Dupin of the other

¹ *Acte d'accusation* made by M. Persil, Procureur Général, before the Chamber of Peers, v. *Supplément au Moniteur*, du 22 Septembre, 1831.

day created certainly no greater sensation than did, twenty-three years ago, the famous cause to which we allude; and the maiden-speech of Montalembert to his assembled colleagues, whom he confronted for the first time, will be handed down to posterity as a monument of courage, talent, and sincerity. To the usual interrogatory touching name, calling, &c., he replied in these few words:—"I am named Charles, Comte de Montalembert, and am a peer of France; I am twenty-one, was born in London, and my profession is that of a schoolmaster." When M. Frémery, the defendant's counsel had spoken, the youngest *accusé* rose, and a quarter of a century has barely sufficed to deaden the echo awakened that day in the walls of the Luxembourg by the tide of eloquence that poured from the lips of the scarcely more than boy, whom a cruel bereavement had, to use his own expression, left "lonely in the world and an orphan amidst his peers." The commencement of his speech is curious, inasmuch as it clearly sets forth a premeditated plan of conduct through life, to which through life, whatever Montalembert's mistakes, he has undeviatingly adhered. After giving his reasons, simply but uncompromisingly, for condemning the monopoly of the University, he thus proceeds:—"When I had, from my own experience, seen the fruits of the Government system of instruction, I made to God and my own conscience a solemn vow: I promised to contribute, during all my life, and with all my strength, to the ruin of that oppressive and corrupt plan of education. Of this solemn, this religious, this irrevocable vow, I am now beginning the fulfilment in your presence."

Instead of entering on his discourse with the usual words "Noble Peers," the boy-orator commenced his harangue aggressively, thus:—"Peers of France!" and it may be interesting to reproduce at this distance of time the most celebrated passage of what at the moment fell like a thunderbolt on the political world of France, scorching root and branch of the lordliest of its recent illustrations. After repeating over and over again that his object was not to force religious tendencies on the University, but merely to arrive at the liberty (guaranteed by the *Charter*) for each citizen to instil

such into his offspring, were he so minded, Montalembert proceeded:—"For forty years past here is what the Government has said to the nation: Frenchmen, you are no longer Catholics, and we will tell you what is the true creed of the citizen and really enlightened man: you shall believe, with Danton, in the social and domestic unity of the Republic, proclaimed by the headsman, and sanctioned by the guillotine; with the Directoire, you shall only believe in corruption and gold; with Napoleon and M. de Fontanes, you shall believe in the imperishable glory of the Empire, depository, according to the Decree of 1808, '*of the happiness of all nations and of all the liberal ideas of the globe*;' with Louis XVIII. and M. Royer Collard, you shall believe in the sacred mysteries of parliamentary doctrine; and with M. de Corbière, in the *censure* and in electoral frauds; with M. de Frayssinous, in whatever is most subtle in Gallicanism; with M. de Vatismenil, in parliamentary judgments and the theology of M. de Montlosier; with MM. de Broglie, Barthe, and Merilhou, in the infallibility of M. de Vatismenil; and, lastly, with M. de Montalivet, you shall believe in the honour and justice of convicts, and shall be assured that churches are no more than public edifices, that the liberty of the dwelling-house, the secrecy of wills, whatsoever, in short, touches public morals, public decency, are mere words, and that every profanation is secure of impunity, allowable to those who have a telegraph at their orders, and a ministerial portfolio in their hands! Here, then, is the shameful series of the Government creeds,—creeds submitted to by the youth of France, and by them, alas! too often adopted. Here is the barbarous game which diverts our Sovereign Lords the Pontiffs of the *Royal Council of Public Instruction*! and is it not now, if ever, the occasion to exclaim:—Since the world's origin, no more execrable tyranny has degraded the human race, and if anything were wanting to prove how cruelly impaired is the true notion of freedom in our age, it would, no doubt, be found in the base patience wherewith such enormities are borne?"¹

¹ Debates of the Chamber of Peers formed into a Court of Justice. 19th September, 1831.

The Montalembert of yesterday before the *Corps Legislatif* is the Montalembert of twenty-three years since at the *Chambre des Pairs*. As in the *Affaire Dupin*, so in the *Procès de l'Ecole libre*, he contrived to attack those whom ordinary defendants seek to propitiate, and turned each peer into an enemy at the very instant he was about to assume the functions of a judge.

The sentence of the *Cour Royale* was confirmed, and the *minimum* of the punishment again awarded, 100*l.* fine. Not even the haughty vituperations of the accused had done away with the latent feeling in the breasts of his colleagues, that somehow or other the Government was in fault, and that, although the letter of the Law must be upheld, its spirit was destined to be modified sooner or later, and *that* portion of liberty which is fitting and natural — (which it is indeed *unnatural* to withhold) — accorded to the irresistible exigency of coming times.

From this epoch until the year 1839, when he was admitted to a "deliberative voice," or the right of vote, in the *Chambre des Pairs*, M. de Montalembert took no active part in public life. He published during this period several remarkable works, which constituted his titles to be elected a member of the *Académie Française*; and he travelled through Italy and Germany. The Abbé de Lamennais, in whom, until now, M. de Montalembert had, as he himself termed it, "made it an honour to acknowledge his teacher and his friend," was the second associate whose further claims upon his friendship he denied. In 1833, Lamennais, Gerbet, and Montalembert went to Rome, to plead the cause of their journal and its opinions before Gregory XVI. The *L'Avenir* was condemned, and the first symptom of revolt manifested on the part of M. de Lamennais. From that hour, all connexion ceased between Montalembert and the Abbé, and for the moment the intellectual and political tendencies of the former found their centre of activity in the cause of Poland and its insurrection against Russia. Adam Mickiewicz had just published (in Polish) his famous *Pilgrims of Poland*, which Montalembert forthwith translated with an original preface of his own. This preface occasioned the

almost immediate suppression of the volume on account of its extreme violence against the Government; and it is somewhat singular to quote, as falling from the lips of the future *orateur dynastique*, phrases, where speaking of victory he says: — “All the causes she crowns are contemptible, or when by chance she favours *during three days* a cause both noble and just, it is in order to lead it solemnly to the tomb, swathed in its shroud of shame by the care of two Chambers and a King!” Nowhere does he spare the monarch whose dynasty he was some years later to defend; but alluding to him in contradistinction to his predecessors he exclaims: “We have fallen lower than with Louis XV., who regretted Choiseul for Poland’s sake; but it is true these absolute kings did not pretend to reign in virtue of a nation’s will, and did not, so far as we know, set up as patterns for husbands, fathers and domestic men! Now-a-days we enjoy ignominy and ridicule in equal parts. If ever Posterity *believes* France to have been really the accomplice of those who prostituted her name to the Czar, we shall then have fallen to the lowest stage of degradation—yes—even to the *very* lowest of all; inasmuch as in every mind one being ranks lower in the scale of humanity than the executioner himself, and that is the executioner’s man!”

If our readers are curious to trace in the young man of three-and-twenty the germ of the author of the letter to Dupin, they may find it plainly in the following passage wherewith we end our quotations from the “*Pélerins Polonais*.” Passing in review the state of the different nations of Europe—“The punishment of France,” says Montalembert, “because less painful, is no less vile. What is not her humiliation? Delivered up to a set of impudent jugglers, and forced by their mouths to renounce her destiny, and betray the hopes of the world; forced to accept as her’s the cynical doctrines of corruption and tyranny promulgated by her chiefs; terrified by the theories more bloody and not less oppressive of the party which aspires to power; ransacked by a horde of *administrators* born of imperial despotism, by *magistrates* who seem commissioned to destroy the law in honest men’s esteem, by courts whose spirit is mixed of half hangman and half lackey,

dishonoured abroad by her diplomacy, at home by her police, debased in her intelligence and her faith by the university, and in her conscience by the torture of the official oath—France expiates under the yoke of ignoble masters the materialism that the last century introduced into her laws and her habits of life and thought. Unfaithful too long to the fixed principles which alone are the source of life to all constituted societies, one would be inclined to believe that, as of old, eunuchs had been charged to inflict upon her the death ordained for adulterous women, and that they were even now smothering her in mud and slime!"¹

To this love of Poland (which, in the case we have just alluded to, may be regarded as a pretext for publishing to the world his opposition to Government) M. de Montalembert was steadily faithful for years of his political career,—may even be perhaps faithful still, in spite of the anarchy sown by Polish refugees in nearly every capital of Europe.—For his hatred of Russia endures undiminished to this hour, as indeed let us say at once, his hatred of every despotism, whatever its disguise or shape; whether open and avowed, cloaked under the garb of liberal institutions, or wrapped like a hungry wolf in the sheep-skin of democratical fraternity.

We do not think there is an oppression against which M. de Montalembert's voice has not been raised, an injustice which has ever found in him a defender, or a single *possible* liberty whereof he has not been the champion. His first speech in 1839 (after being admitted to sit in the Chamber of Peers) was in favour of the inheritance of literary property, or continuation to author's children of the father's rights. Here he was again opposed to M. de Broglie, who said, "Peers were not assembled to dispense munificent donations to literary men" (*leur faire des libéralités*); to which his young opponent boldly replied, "he did not see why they should *not* be there for that purpose." From this moment we follow Montalembert gradually till the

¹ "Livre des Pèlerins Polonais," Paris: E. Rendnel, 1833. The rarity of this little volume is such, that latterly a rich amateur offering to pay *any* price for it, could not procure it after three months' search.

revolution of 1848, tracing every step by some harangue more brilliant than the last. Not a discussion on the "*Adresse*," or the question of the "*Fonds secrets*," but during nine years finds him at his post attacking the Ministry (and above all the Ministers of Public Instruction, MM. Villemain and Cousin)—though ostensibly in the ranks of those who supported the Orleans dynasty.¹ His marriage with Madlle. de Mérode, by bringing him constantly together with the persons most attached (through the Queen of Belgium) to the Orleans family, had no little contributed to this change. The progress of years too had taught him to mistrust and fear the democratic party, and the younger branch of the House of Bourbon seemed best formed to promote the interests he had most at heart. In the year 1848², just as Louis Philippe's reign was about to meet its violent end, Montalembert separated from the *ultra*-Liberal party in his speech on the *Sonderbund* and the affairs of Switzerland, — a speech, the *éclat* of which was such, that before the orator had well nigh ended, a unanimous proposition for instantly printing and distributing it was made. His first words declared war to his former associates. "Battle has been done in Switzerland," said he, "neither for nor against Jesuits, neither for nor against national rights — *but for and against you all who are here*" (the event proved he had seen clearly); "battle has been done by savage, intolerant, irregular liberty, against the liberty that is civilised, tolerant, regular, and legal, and whereof you are, or ought be, the defenders throughout the world." After one of the most brilliant harangues ever held in a political assembly, "Fear is our bane," exclaimed the speaker; "let us chase it from us! Let us not allow the wicked alone to have the monopoly of energy and daring! Let honest citizens also feel the energy of

¹ There is a *Legitimist* Deputy now in Paris who remembers M. de Montalembert in the year 1839 taking him by the arm in the Tuileries gardens, and trying for the space of a couple of hours to convert him to *Orleanism*, saying to him, "Louis Philippe alone can save us, for he alone can give us the *liberties we must have*." Ten years later he said to the *same* deputy: — "Louis Napoleon alone can save us, for he only can give us the *authority we need*."

² Vide *Moniteur*, 14th January, 1848 — *Question de l'Adresse*.

a good cause; let them dare in their turn; but above all, let us be united to obtain the three things without which there is no life; liberty, but with it, order and peace — let us unite in defence as our enemies in aggression ! ”

Thus we have the second æra of Montalembert's political life, that which is inevitable to almost all, — the period when resistance becomes the watchword of the very men whose voice ten years before in the unreflecting ardour of youth, and its natural combativeness, had shouted “ *attack* .”

The consequence of Montalembert's altered opinions was the rupture with his some time collaborator, the celebrated Père Lacordaire, and all the advanced Republican party, who could, from this hour forward, find no terms of hatred violent enough to apply to the man whom they chose to term their betrayer. Montalembert went with Venillot and the *Univers*, whilst Lacordaire founded the *Ere Nouvelle*, whose short life was consecrated to the promulgation of Neo-Christian theories leading — if logically followed out — to every imaginable disorder, and to absolute anarchy, under the pretext of charity and evangelical fraternity.

From the speech on the *Sonderbund* to the one on the Liberty of the Press (July, 1849), there is but a slight transition, and we are no longer surprised to hear the most ardent defender of freedom exclaim : “ The last, the only means left us of saving liberty is, by limiting it ! . . . from unlimited liberty to absolute despotism there is in France but one step .”

The first remark made upon Montalembert by his very best friends is this : “ He is so variable, so capricious — *il est insaisissable* ” — but we are much inclined to refute this as an undeniable error. Take Montalembert as he really is and from his own point of view, and he is more than merely consistent, he is obstinately so. His unity lies in his love of liberty and in his devotion to his faith. Both are equally fervent and sincere, and to both he looks upon everything else as subservient. But his mistake resides in the passionate way in which he adopts first one and then another instrument of arriving at his ends, attaching himself alternately to men and systems various and opposed, and each time with the ardent convic-

tion public opinion desires to see applied, to things unchangeable alone. At twenty he beholds the salvation of his church in liberty, and this belief endures still; but he sees liberty allied to democracy, and *this* opinion has changed, yielding to the monstrous excesses committed by the ultra-democratic party, and to the obligation of confessing that "from the foot of the capitol to the barrière de Fontainebleau, and from the faubourgs of Frankfort to the bridge of Pesth, everywhere the poignard of the demagogues has been wrapped round with the flag of liberty!"¹ In 1839, M. de Montalembert was convinced that the Orleans branch *might* do more towards the promotion of liberal institutions and religious feeling in France than any other Government, and therefore he turned to the Orleans dynasty too confidently, and too exclusively proclaiming them the *only* possible protectors—Still, the object he pursues does not change, nor in his *aim* has there ever been even the most trifling variation, however many are the roads chosen to pursue it.

In judging this very remarkable man (such his worst enemies do not deny him to be) we should never forget that he is half our countryman, for this will help materially to explain to us much that in his talent and character remains totally incomprehensible in France. Montalembert has a genuine Briton's love of freedom, which is perpetually clashing with the notion conceived of liberty by our neighbours, who, even when they overthrow society from roof to base to obtain it in the abstract, invariably contrive to outrage it in practical details. This won for him from his Orleans friends the reputation of "the most *génant* and *undisciplined* of dynastic orators"—and the ultra-Conservatives, to whom from 1848 to 1852 he brought the support of his eloquence and contemptuous daring, have never ceased terming him a "*factious* spirit."

Since the Revolution of February, every difficult question has found Montalembert foremost on the breach. In 1848, he defended the principle of the liberty of association against

¹ Vide *Moniteur* of 19th October, 1849—Debate on "*Crédit supplémentaire pour l'expédition de Rome.*"

the Government plan of buying back railroads from separate companies. From February, 1849, to the 31st May, 1850, we have him supporting, through a dozen discussions at least, the reformed Electoral Law, and combating the excess of centralisation (that eternal thralldom of France). If the Magistracy of France retained its *inamovibility* (that is, the power of being independent), it is mainly owing to M. de Montalembert, and to him is also to be traced the last defence before the *assemblée* of Louis Napoleon's "*dotation*" as President of the Republic, and his demand of money for "*frais de représentation*."¹ This was also the last considerable speech made by Montalembert in the free Parliament of France, and, though, as usual, it lost the cause for which it pleaded, it excited immense interest in all classes, because it was in fact the recital of Montalembert's acquaintance with the President from first to last. No speech he ever made raised a greater tumult in the assembly than this; for whilst his enemies, the Democrats, were furious at hearing the Executive authority defended, his friends of all monarchical parties were hurt and angry at his declaring the Elective-Presidential Power to be *for the moment* the only possible — and *because* the only possible, the only *legitimate* one — "*la légitimité du possible*;" — This soon became the cant phrase bandied about from *sàlon* to *salon* as a reproach to its author², who was accused of having, for the hundredth time, changed his ideas, whereas he had but, as usual, seized too passionately upon a new instrument for working out the triumph of his one eternal ever-ruling idea.

Upon this speech of the 10th February, 1851, were based those claims of Montalembert upon Napoleon's gratitude, which caused him, in his speech of three months since in the *Corps Législatif*, to say, "I have the satisfaction of leaving

¹ Vide *Moniteur* of 10th February, 1851.

² When asked on one occasion by an intimate friend *why* he objected to the Bourbons of the elder branch, M. de Montalembert replied: "Because they cannot serve religion, and are the born enemies of the *nobility of France*." This is a doctrine which is not wanting in believers, and many *gentils hommes* pretend to trace from Cardinal Richelieu downwards, a determination in the Kings of France to humiliate the French aristocracy, and annihilate it as a political body. M. de Montalembert is far from being singular in this creed.

the Emperor my debtor — he can render me no services equal to those I rendered him.”

After the *coup d'état* of December, M. de Montalembert was frequently summoned to the Elysée, and was believed to be one of the supporters of the new régime which he had conceived strong enough to afford ultimately to be liberal and just. The alliance, however, lasted but a short time, and when the name of the *ancien pair de France* figured on the list of senators, its bearer directly wrote his public and official refusal of accepting this dignity. It is said that on that occasion he had a long conversation with M. de Persigny, and that, on the latter asking “*why* he seceded from the Bonapartists, having till then gone with them?” he replied — “Because I do not know your policy. I do not know your system.” Persigny is reported to have replied: “Nothing is more simple: our system is, in the Interior to govern *with* and *by* the popular masses; with, *or without*, the higher classes, according as they choose — but *always against* the *middle* classes; — and our exterior policy is told in one word: restore to France her *natural* frontiers!”¹ Montalembert’s reply was, as might be expected, a negative one: — “If I held back when in ignorance,” he is affirmed to have answered — “still more, now I am enlightened, do I refuse my support.” Still, this was not meant as an announcement of systematic opposition, for, on the contrary, Montalembert’s vote was impartially given to every Government measure he deemed individually good, and, amongst others, to the *Loan* decreed just before his own *mise en accusation*. Little by little, however, the progress of the compressive system, and the conduct of the Government *entourage*, made the impatient honesty of Montalembert and his inborn love of freedom fret, chafe, and at length explode in private conversation and in the (no less private) letter to Dupin. It must also be remarked that *all* his natural associates, qualified to be such by rank, position, fortune, and weight in society, shrank from

¹ Let it be remembered that it was Persigny who spoke, and that for *not* entirely following out these Ultra-Bonapartist ideas, Louis Napoleon is thought by his ex-Minister to have committed his greatest fault.

the thought of being mixed up with the Government, in any degree. Now, however *commanding* a man's talent may be, the influence of those who constantly surround him will be felt, and this has probably had a certain share, in the now declared opposition of the famous orator.

Independently of his station, the Emperor has individually many defenders in France, in gratitude for the great services he has rendered; and among the most determined friends of the monarchical principle these defenders abound. But the alienation of men whose weight, both social and political, would make their alliance invaluable, rendered M. de Montalembert's loss to the Imperialist party a severe one, and this accounts for the irritation which gave rise to the proceedings against him.

His is a character formed to leave neither friends nor enemies calm in attachment or dislike, — a character in every respect excessive, and provoking to excessive hatred those whom it offends. His good qualities as much as his defects render him incomprehensible to Frenchmen in general; for the determined fixity of his aim, and the untiring energy with which he pursues it, are even more foreign to their habits than the seeming capriciousness he displays in his temporary political fellowships. Daring to a fault, and yet more haughty than daring, the full force of Montalembert's talent bursts forth only in hostility. Brilliantly bitter, in irony a master, most witty when most disdainful, and unconciliating always, — Montalembert is never thoroughly at his ease but in attack, and the fact of having to defend seems to neutralise his powers, when it does not (as in too many cases) turn them against the cause he is trying to serve. He has an Englishman's love of *fair play*, which is also a mystery in France, where a man is censured if he will not go all lengths with his party. Scarcely a brother Peer but thought Montalembert supremely *eccentric* when, in 1847, he battled for Emile de Girardin's being allowed to explain himself before the *Chambre des Pairs* upon a (so-called) defamatory assertion he had published touching the noble Assembly. "Let him be heard," repeated Montalembert, over and over again. "No man ought ever to be accused

without being allowed to defend himself." At which his colleagues shrugged their shoulders, nor were there wanting those who murmuringly replied: "Wherefore '*heard?*' let him be *condemned* at once, — that will be best."¹

The very austerity of Montalembert's life and manners makes enemies for him as appearing to imply blame on a race all devoted to enjoyment; and upon the universal corruption of an age whose god is gold, his unsullied honesty casts in itself a mute reproach. Too pious for a soldier, too pugnacious for a priest, there is nevertheless a mixture of priest and soldier in his nature; and we are disposed to believe that, whatever his defects, the sympathies of Englishmen will never be wholly denied to the man, who through life has acted up to the leading convictions with which he set out, and who at this hour, as in the flush of boyhood, can boast of "being resigned to everything, albeit to servitude."

¹ Vide *Moniteur* of 3rd June, 1847.

ART. II.—HISTORY OF JURISPRUDENCE.

No. VIII.—Vico. 1688—1750.¹

SOUTHERN Italy has been a land of great conceptions and great misfortunes. Magna Græcia in the most ancient times presented the legislation of Pythagoras, of the Locrians, of Charondas,—then suddenly the massacre of the Pythagoreans, of the nobles by the Plebeians. The Sybarites, masters of twenty-five cities, could not resist the revolution, and were obliged to fly elsewhere, in order to seek an asylum. Beside these violent catastrophes are found the delights of Capua. Under the Roman dominion Southern Italy is the land of Marius—of a crowd of other great men. In the middle ages the victory of forty Norman Knights recalls to memory the sudden revolutions of Magna Græcia. But these valiant men did not conquer the climate of Naples—they could not follow in the steps of the Normans of England, and the power of the Barons in Naples was destroyed by the *coup d'état* and massacre in 1480. Since that time revolution has succeeded revolution, and almost every foreign attack has been followed by the conquest of the kingdom.

The great men of this country have not been successful in raising the general character of the people: Saint Thomas, Salvator Rosa, Campanella, Vico, Filangieri, all here appeared in the midst of the most profound and barbarous ignorance.

The Spanish conquest, by exalting the Italian nobility, injured Naples. In the seventeenth century the gentlemen of the kingdom had many privileges. The nobles had castles, villages; there they administered justice to their peasants, and protected brigands. Hence arose hereditary feuds and

¹ For Nos. I. and II. see vol. xvi. pp. 59. and 268.; for No. III. see vol. xvii. p. 105.; for Nos. IV. and V. see vol. xviii. pp. 91. and 249.; for Nos. VI. and VII. see vol. xix. pp. 93. and 342.

feudal wars. The nobility, too, were exempted from most of the burdens of taxation, and consequently prodigal of the tribute which they voted for Spain. The Spanish Viceroy represented all that is disgraceful in modern bureaucracy.

The insurrection of Masaniello is the great event of the history of Naples under the Spanish rule. In 1647 the people of Naples groaned under excessive taxation; the nobles speculated on the general misery, and increased it by their monopolies. Many attempted to smuggle, but they were seized and imprisoned. The fisherman, Masaniello—a name which now would be forgotten by all except the historian, were it not that the divine opera of Auber constantly tells the great capitals of Europe how easily a revolution may be effected in Naples—was completely ruined in paying the ransom of his young wife, who had been seized at the gates of the town with a little corn. It was the eve of the fête of the Madonna. The immense populace, without work and famishing, joined in a riot between the custom-house officers and some poor peasants who had not wherewith to pay the octroi upon some baskets of fruit. Masaniello put himself at the head of the mob. They soon attacked and carried the town-hall. The Viceroy with difficulty saved himself. On the one side now the cannon of the three forts were directed against Naples, and the Spanish nobility joined the soldiers; on the other, 200,000 men, armed with pikes swords, and sticks, were under the orders of Masaniello; these spread themselves through the streets, and destroyed upwards of thirty of the palaces of the nobles. The bandits and outcasts of society were invited to aid the Government, as the King similarly summoned the Lazzaroni during the insurrection of 1848, and gave up the town to their plunder. The bandits were defeated by the rebels, and the prisoners were executed. Masaniello was the chief of the revolution. Some learned men, who had been imprisoned by the Spanish authorities, assisted him; but they were obliged to wear masks on their faces. Masaniello was induced by the Archbishop of Naples not to act as a rebel to Spain. He was terrified at the greatness of the rebellion, and the Archbishop gave him hopes of pardon. Masaniello and the Viceroy met;

peace was sworn; many privileges assured to the people; Masaniello was created Duke of Saint George; magnificent fêtes were given. On the following day Masaniello, either intoxicated by his miraculous elevation, or poisoned by his enemies, became mad. He galloped through the city, striking at all he met; he sent many of his friends to the galleys, and designed to destroy the houses in the principal street in order to build a palace for himself. All were dismayed by his frenzy; and a conspiracy being formed, Masaniello fell beneath the daggers of his friends. The mob seized the body, cut off the head, and foully dishonoured it. A re-action ensued; the people resumed their madness. One moment they believed that Masaniello had risen from the dead to lead them to the battle; the next they made him a saint, and deposited his body in the cathedral. The funeral of Masaniello suspended the civil war. Four hundred priests, thousands of children, four thousand women, attended; forty thousand soldiers trailed their banners in the dust, and an immense populace followed round the bier of a poor fisherman. The artillery of the hostile troops united with the bells of the town in giving the last honours to the mortal remains of Masaniello. The people were again prostrate; the revolutionary frenzy was over; and for two centuries the people of Naples made no attempt to escape from despotism.

GIAMBATTISTA VICO was born at Naples in 1688, about forty years after the revolt of Masaniello. His father was a poor bookseller; and Vico obtained his education at the Jesuits' School. Even in his early youth he was distinguished for extraordinary application, and used to pass the entire night in study. Having mastered the ordinary course of the school, he proceeded to study philosophy under Father Ricci the Jesuit, a disciple of Duns Scotus, and a partisan of the doctrine of Zeno. Henceforth, Realism appeared to him preferable to Nominalism. Quitting the school of Ricci, he shut himself up for an entire year to study Suarez. He did not repent of this. This author, says Vico, has marvellous perspicuity, his style is elevated, his eloquence incom-

parable. His father now urged Vico to the study of the law; and he attended the lectures of Verde, who, amongst the doctors of the University of Naples, was one of the most profound legists and eloquent professors, but, like many other men great in their own time and sphere, is now comparatively unknown. Not being able to learn much from this professor, Vico applied himself to the study of the Civil Institutes of Vultejus, and the Canonical Institutions of Canisius. He eagerly began to trace the general ideas of right from particular cases, and from the original signification of the words employed by lawyers.

Vico's excessive labours, the poverty of his family, and the new ideas which confusedly agitated his mind, destroyed his health. One day, that overcome with weariness and disgust at his position in life, he was resting in a library, sighing after the repose necessary to accomplish his grand projects, the Bishop of Ischia, Giovanni Rocca, approached him, inquired with interest into his circumstances, and interrogated him on the merit of the different methods of education suited for the study of the law. Vico then was meditating upon the work since published under the title "*De nostri temporis studiorum ratione*." He expounded his system to the good bishop with such warmth and clearness, that he asked Vico to make a trial of it upon his young nephews, who inhabited a fine castle situate in a delightful climate, and furnished with a rich library. He accepted the offer and remained there for nine years. There he studied the Canon Law, the Christian dogmas, and, principally, the examination of the question of Grace and Liberty, in the work of Richard. Vico, then reflecting on the necessary harmony between Grace and Liberty, divine action and human action, between fate and free will, was led to believe that the development of society, like the human heart, must be subject to one constant, universal, and divine law, the variable application of which depended upon the unstable will of man. Thus minds happily gifted by nature find in all things an opportunity of improvement; and a geometrical dissertation on the doctrine of St. Augustine made Vico conceive the idea of a single universal principle in the natural law of nations.

Vico now proceeded to an extended course of the ancient writers. Having read Aristotle, he thus characterised the distinction between Ethics and Jurisprudence. "Jurisprudence—which is, properly speaking, the art of Equity, and which rests on an infinity of minute precepts of natural justice discovered by jurisconsults in the reason of laws and the will of legislators—contains the explanation of laws by their determinate causes, and teaches the acknowledgment of their results in different social necessities. Moral philosophy teaches the science of the just, which proceeds from a small number of eternal truths dictated to metaphysics by an ideal justice, constitutive of states, the director of reparative justice and distributive justice, which regulate in their turn utilities or interests by means of two eternal measures, the arithmetic and geometric."

Vico in his retirement pursued his studies; and he has left us interesting and valuable memoirs as to their subjects. The Stoic and Epicurean philosophy, the injurious effects of an exclusively mathematical education, the works of Bayle and Descartes, are all discussed by him. Returned to Naples, he remained isolated and in poverty. Genius does not always suffice for itself, and he felt the want of some medium of communicating his ideas. In 1597, he obtained a professorship of Rhetoric, which, however, only brought him 100 crowns per annum. As yet he had adopted as masters only Plato and Tacitus. The former painted man as he came from the creative idea; the latter such as he was become by his own fault. One sought the true, the just, the good; the other the certain, the equitable, the useful. Vico perceived in Plato and Tacitus the representatives of the two epochs, the two civilisations, the two wisdoms which later formed the subject of his New Science. A third philosopher was now studied by him, the great Chancellor, Lord Bacon. And he henceforth proposed to himself never to lose sight of these three great models.

Vico was subjected to the wretched fate of men of letters under a despotic government. Dependent on the aristocracy, excluded from high political or military dignities, never

essaying action, the domain of literature was in words, — its task to express them as well as possible. Vico, this fertile thinker, congratulated his good fortune whenever some illustrious personage came to interrupt his meditations upon eternal laws, and commanded a discourse upon a given subject. Happy when he had only to celebrate the graces of a bride, or the transports of a young mother, his political eulogiums must be unsparingly condemned. Thus, after having branded with infamy the Austrian conspirators when their party was defeated, he, at the orders of Count Daun, overwhelmed them with eulogiums on their triumph. On the arrival and departure of all the Spanish Viceroys, he made long harangues in Latin, in which he compared these worthies to Cæsar, Cato, and Alexander. So his *Life of Marshal Caraffa* is a eulogium upon his conduct in the Hungarian war, where he committed atrocities which even the manners of that age did not excuse. We, in our own country, where the press, the universities, and the educated reading public afford full employment for men of letters, — whilst in France, political literature is already the avenue to political power, — must look with indulgent compassion upon the weakness of Vico, living in Naples, and writing early in the 18th century. And let us remember the complaint of Dryden, when he mourns that the talents which he knew to be given to him for the service of mankind, were, to earn his subsistence, wasted in writing lampoons and wanton plays for the amusement of the Court.

Vico had held his professorship for twenty years. He had been working out a system of jurisprudence which, under the guidance of Christianity, should make the Platonic scheme of Justice harmonise with a philology founded on the knowledge of languages and history. In 1720 appeared the first book of the treatise *De Constantia Jurisprudentiæ*, under the title "*De uno universi juris principio et fine uno.*" In this book the boldness and novelty of his views excited a multitude of angry opponents. He treated their antique doctrines with the same felicitous audacity which he displayed in his series of lectures on Homer. He showed that this

poet, whose life so many writers had endeavoured to construct, who had caused so many chronological disputes, and excited the rivalry of all the cities of Greece, had never existed; that his poems so much admired were not poems; that those heroes so well known to all, represented by all sculptors and painters, sung by all poets, had never been real personages. It is a trifle to-day to deny the existence of anything; but he who now would proclaim Napoleon a myth, would cause less sensation than Vico, a century ago, produced by denying Homer. This rashness, no doubt, was the cause of the check in life which he now experienced.

In 1722 Vico applied for the Professorship of Jurisprudence, to which his talents undoubtedly entitled him. He was unsuccessful, and henceforth for ever renounced the hope of prosperity. In 1725 he published the celebrated treatise entitled "*Principi di Una Scienza Nuova*," the second edition of which in 1731 was honoured with the approbation of Cardinal Corsini, afterwards Clement XIII.

Vico struggled all his life against misery, and struggled in vain; he could not obtain the place of secretary to the city, nor the Professorship of Jurisprudence. Only in his declining years he was named historiographer to King Charles de Bourbon. Scarcely any bitterness was spared him; with the sufferings of his children he had to support the disdain of his cotemporaries. Poverty without glory, obscurity without wealth, was his lot; such was the life of the most distinguished man of letters Naples has produced. He used himself to say that the age was opposed to him, and that Locke and Descartes conspired against the Christian philosopher. Indeed Vico, who considered Monarchy as amongst the most perfect forms of government, and the One True Church as the principal safeguard against barbarism, could scarcely be tolerated by the negative philosophy of the 18th century.

Vico, buried in misery and poverty, died of a cancer, in his 65th year: conscious he had faithfully worked his best in this life, and hopeful of the next, he departed from his worldly cares, repeating with his dying lips the Psalms of David.

If Vico, notwithstanding his extraordinary merits, be little known, the fault does not rest solely with posterity; nor has

such neglect been caused by his opposition to the philosophy of the succeeding generation. Much is to be attributed to defects in his style. He was gifted with a prodigious memory, which had aided him to acquire an uncommon erudition. But this memory was injurious in causing him sometimes to dispense with documents. The very knowledge which he had accumulated produced a chaos. Although the author of a treatise on method, Vico himself did not know how to arrange his ideas after the order which gives clearness. He felt that the great novelty of his doctrines must excite astonishment and defiance. Proofs presented themselves in crowds to his mind, and rather than choose amongst them, he wearies himself and his readers in repeating them on every new occasion. This perpetual enumeration of ideas detached from one another, renders his style immeasurably long, irregular, obscure, full of incidental phrases. His Italian is only a Neapolitan dialect united with the Latin,—a language at the first glance difficult except for a Latin scholar and a native of Naples. Vico also sometimes employs words in their ordinary signification, often in the particular signification suggested to him by their etymology. For these reasons Vico has been little read in Italy. Ferrari, in 1836, has published the first complete edition of the works of Vico. This is accompanied by notes explanatory of the text. The author of *L'Essai sur La Formation du Dogme Catholique* remarks on these notes, that we may now read Vico without comprehending him; but before M. Ferrari it was sometimes impossible to decypher his works.

In France M. Michelet has translated some of Vico's works. But whether that the mannerism of Vico fatigued him, or that the vivacity of his mind did not harmonise with Vico's didactic style, the translation is by no means faithful. In 1822 the *Scienza Nuova* was translated into German by Weber. On this the French critic remarks that M. Weber merits no reproach. When he does not understand his author,—a thing which often occurs,—he resigns himself immediately; and reproduces faithfully in German the same obscurity which is found in the text; with this difference, nevertheless, that the author of the text understood himself,

and that the translator did not. In 1845 another French translation appeared. Mr. Coleridge, in his Introduction to the Study of the Greek Classic Poets, has translated the third book of the *Scienza Nuova*, which treats of the discovery of the true Homer. With this exception no part of Vico has hitherto been translated into English.

It has been foreign to our purpose to give more than an abstract of those portions of the New Science which treat of politics, jurisprudence, and the progress of civilisation as connected with them. Following the French translations we have attempted to arrange in logical order the subjects of Vico's involved sentences often rambling over a page; and we have suppressed incidental phrases such as etymological proofs, and other matters too often repeated.

To some of his conclusions Vico was irresistibly conducted by the recent progress in physical science. After Kepler and the mathematicians of Pisa had found the formulas of the movements of the physical world, the problem which naturally presented itself was to seek those of the civil world. If an eternal order govern the orbits of the stars, it must necessarily be met with in the successions of nations and states. Such was Vico's idea, a perpetual revolution of barbarism, liberty, power, wealth, corruption, barbarism.

M. Quinet traces the originality of Vico to one single thought, the creator of all the others, that civilisations proceed from the idea of God, like rivers from their source. The day when Vico, after reading Grotius and seeking to resolve the problem of the origin of society, discovered that community amongst men arose from the thought of God, that day he found his science. Whilst the civilians Grotius and Puffendorf, and later still even Rousseau, in their search after the origin of society, make everything depend upon the first inventions of the mechanic arts, Vico leaps at one bound to the conception of God, and this thought being known, society is constituted. Vico sees, like Bossuet, that the civil world is submitted to the government of Providence; but he does not, like him, stop short at this general thought; he approaches much nearer to the living truth. To say that empires are moved by Divine ideas is to remain still in the abstractions of

Plato. This is Vico's precise originality; it is that of which he is the least conscious; he identifies, unknown to himself, the divine ideas, the warnings of Providence, with positive worship,—with religions, which thus become, as it were, so many partial revelations of eternal wisdom, in the city of space and time.

Without entering into the metaphysics which Vico cultivated, let us review some of the prominent points of his social philosophy. Every society is an association grounded upon kindred. The natural sentiments of man bring him to associate with his fellows. The principles of this association are the desire of existence, the desire of knowledge, the shame of ignorance, good faith or equity—which is the relation of persons to things according to truth, or the retribution of persons by means of things according to justice,—the love of our fellow-men, or charity. These principles are themselves applications of a great universal principle,—truth. In effect, if it is truth properly so called, which regulates the relations of man with himself; equity regulates the relations of men between one another. What is true for the spirit, is good for the heart. The establishment of these principles and the satisfaction of these hearts constitute the natural liberty which is assured by natural law. This guarantees the free exercise of the thoughts; converts wants into rights; and preserves from danger by proper protection.

The want of existence in natural liberty becomes the right of existence in natural law. This right is composed of the right of property or dominion, and of the right of defence or protection. Dominion consists primitively in the right of using things common to all, as the running water, the air, the sea. It is the use of the result. Next comes the possession of the source itself; and this possession is constituted by occupation, which is not intended to acquire, but to point out. Occupancy is not the taking of possession; it is the designation of property. All commerce is derived from this first dominion, and exchanges are the objects of the first contracts.

The right of defence or of protection forms the second part of the right of existence. By this right man is autho-

raised to employ violence in order to preserve his own life, or the lives of his children, his property, or that of his family. The word virtue, — *virtus*, — signifies the strength of resistance.

The right of knowledge is as precious to man as the right of existence, for all crimes proceed from ignorance. There are two kinds of ignorance; ignorance of the fact itself, as, for example, where *Œdipus* weds his mother without knowing her, and ignorance of the value of the fact. This again is subdivided into many species. Thus, we may be ignorant that a law of a country which we inhabit forbids such an action; we may mistake the limits of good and evil; finally, we may be ignorant of our true nature, and act conformably to instinct like the beasts. For all these species of ignorance up to the last exclusively, man bears his chastisement in his conscience, which makes him ashamed of having been ignorant of the truth. The true punishment prepared by God for guilty man, is precisely in this unconquerable attraction of the truth, which prevents any one removing himself from it, and leaving himself unassisted. Punishment is but the auxiliary of shame and conscience. But he who knows not himself, not only is ignorant of the truth, but also of the wrong which he does in contesting it. For him without shame, without conscience, shall we say there is no punishment, — nay, rather, the most terrible of punishments; a sort of banishment beyond the pale of humanity.

Good faith, or equity, imposes upon every one the obligation of not injuring his fellow-creature, and of abstaining from the property of others. Good faith assures to man the right of existence, and all the rights which are corollaries to it.

Another fundamental law may be suited to a more advanced age than the present. This is the law of social love, which goes further than the law of equity. This regards all the exceptional necessities of human life, and converts them into rights. Thus, according to this law, every one is permitted to take what is absolutely indispensable, and for his own gain to make use of what does not belong to him, provided this be not done to the injury of the proprietor.

All these sentiments are different modes or different expressions of the eternal truth, for they are founded on truth itself, on equity which is an application of truth, and on charity which is an extension of equity. The science which assures the liberty of these sentiments, and the exercise of these rights, is Jurisprudence, which may be also termed the Science of Morality established according to the rules of Justice.

Having given this outline of Vico's general system, we may proceed to an analysis of the New Science:

The second 'New Science', which we analyse here as the last *resumé* of Vico's philosophy, commences with a chronological table arranged after the three epochs of time according to the Egyptians, who considered the world as divided into three ages, of the Gods, of Heroes, and of Men. The first book is on the establishment of principles; and the first chapter is taken up with an explanation of this table. Vico then lays down certain axioms, or philosophical as well as philological sentences, and some definitions. Even as the blood is spread through the body which it animates, these truths should circulate in this science and vivify it, that it may enlighten us on the common nature of nations.

The indefinite nature of the human mind is the reason that man plunged in ignorance makes of himself the rule of the universe.²

It is from this truth that the two human tendencies are derived, thus expressed: *Fama crescit eundo* and *minuit præsentia fama*. Fame has run a long course from the beginning of the world, and it is during this journey that it has received opinions so extravagant and exaggerated on the epochs which are only imperfectly known to us. This disposition of the

¹ Principi di Scienza Nuova, di Giambattista Vico, e con note di Giuseppe Ferrari, Milan, 1836. La Science Nouvelle, par Vico, traduite par l'auteur de l'essai sur la formation du dogme Catholique, Paris, Charpentier, 1845.

None of the works of Vico have heretofore been translated into English, except the third book of the Scienza Nuova, on the discovery of the true Homer, which has been inserted by Mr. H. N. Coleridge in his *Introduction to the Study of the Greek Classic Poets*.

² Works (Ferrari's), vol. v. Scienza Nuova Degli Elementi, i.

human mind is indicated by Tacitus in his life of Agricola, where he has said *omne ignotum pro magnifico est*.

There is another faculty belonging to the human mind, that when men cannot themselves form an idea of things because they are remote and unknown, they imagine them according to what is known and present.¹

This truth points out to us the inexhaustible source of all the errors into which have fallen both nations and the learned on the subject of the origins of humanity; for they judged these after the times in which they commenced their researches, and these times were illustrations full of science and grandeur, whilst humanity had only petty, obscure, and rude origins.

In order to make its salutary influence felt on the human race, Philosophy ought to raise and support weak and fallen man, but should neither compress his nature, nor abandon it to its own corruption.—“La Filosofia, per giovar al gener umano, dee sollevar e reggere l' uomo caduto e debole, non convellergli la natura, nè abbandonarlo nella sua corruzione.”²

This axiom must remove us from the Stoics, who desire the mortification and annihilation of the senses, and from the Epicureans, who place their rule in the same senses. These two schools of philosophy equally deny Providence, which the first replaces by Destiny, the second by Chance. The philosophers also of this last school teach that our souls are mortal. We may designate them, as well as the Stoics, by the name of monastic or solitary philosophers. We will profit, on the other hand, by the labours of the political philosophers, and principally of the followers of Plato, who agree with all legislators in the three following articles; that is to say, in the existence of Divine Providence, in the necessity of moderating human passions, and transforming them into virtues, and, finally, in the immortality of the soul. It is then from this maxim that we derive the true principles of this science.

Philosophy considers man as he ought to be. It then can be useful only to the small number of those who would

¹ Degli Elementi, ii.

² Ibid, v.

rather live in the Republic of Plato, than stagnate amidst the filth of Romulus.¹

Legislation considers man such as he is, and endeavours to make a good use of him in human society. For this end it modifies the three vicious passions which distract all mankind, fierceness, avarice, ambition, and produces from them the army, commerce, and the court: that is to say, strength, wealth, and the knowledge of government. These three great vices, which suffice to destroy all human generations on this earth, become the source of civil felicity. This axiom demonstrates to us that there is a divine providence, or rather a divine legislative spirit, which from all the passions of men having been directed towards their proper utility, — from those very passions which could hurry away men to live in solitude and barbarism, has been able to derive that civil order by means of which human societies are formed.

Nothing out of its natural state can either easily subsist, or last long. — “Le cose fuori del loro stato naturale ne vi si adagiano, ne vi durano.”²

When men cannot know what is true, they attempt to know what is certain; for not being able to satisfy their intelligence by knowledge, they strive to make their will repose on conscience.³

Philosophy contemplates reason, whence comes the science of truth: Philology observes the authority of human testimony, whence comes the consciousness of what is certain.⁴ — “La Filosofia contempla la ragione, onde viene la scienza del vero: la Filologia osserva l’ autorità dell’ umano arbitrio, onde viene la coscienza del certo.”

The second part of this definition tells us that amongst philologists must be classed all grammarians, historians, and critics, who are occupied with the knowledge of languages, and the actions of different nations, whether internal, such as usages and laws, or external, such as wars, alliances, voyages, and commerce. The human Will, in its nature most uncertain, can be strengthened and determined by the common

¹ Degli Elementi, vi.

² Ibid. ix.

³ Ibid. viii.

⁴ Ibid. x.

sense of men towards the subject of human wants and necessities. These wants and necessities are the two sources of the natural law of nations.¹

Common sense is the judgment without reflection commonly entertained by an entire class, an entire people, an entire nation, or the entire human race.²

Uniform ideas born simultaneously amongst entire nations unknown to one another, must have a common source of truth.³

This axiom discloses the great principle that the common sense of mankind is nothing else than the criterion pointed out to nations by Divine Providence, by which they may know what is certain in the natural law of nations.

The nature of things consists only in their commencement at a certain time and under certain conditions. Such a time and such a condition form the nature of such a thing.⁴

The inseparable properties of things must have been caused by the modification or manner in which they have been produced ; it is for this reason that we can know the origin or nature of things by means of the modifications which we see in them, that is to say, by means of their proper and inseparable qualities.⁵

The vulgar traditions must flow from a source generally recognised as true ; that is to say, in possession of the confidence of men. It is by means of this confidence that traditions arise, and that they have been preserved by entire nations and during long periods of time. One of the principal ends of this science must be to find the true sources of the traditions which have come to us enveloped in falsehood and lies through so many ages, and so many changes of manners and languages.⁶

The common languages must be the most important evidences of the manners of a people, such as they were when the languages were formed.⁷

A language of the ancient nations which may have preserved itself dominant until it arrived at perfection must be

¹ Degli Elementi, xi.

² Ibid. xii.

³ Ibid. xiii.

⁴ Ibid. xiv.

⁵ Ibid. xv.

⁶ Ibid. xvi.

⁷ Ibid. xvii.

a grand evidence of the manners of the early times of the world.¹

This axiom renders very important in our eyes the philological proofs drawn from the Latin language on the natural law of nations,—*del diritto naturale delle genti*,—a science in which the Roman people excelled. The learned can use with the same advantage the German language, which possesses the same quality peculiar to the ancient Roman tongue.²

If the laws of the XII. Tables were the customs of the people of Latium from the era of Saturn, and otherwise always fluctuating, but by the Roman people engraved on bronze and religiously preserved by the Roman jurisprudence, they would be a great testimony of the ancient natural law of the people of Latium.³

If the poems of Homer be the civil history of ancient Greek manners, they will be for us the great storehouses of the natural law of the nations of Greece.⁴

There must necessarily be in the nature of things a mental language common to all nations, which can uniformly designate the substance of the things which participate in human social life, and can mould itself to as many diverse qualifications as the things can have divers aspects. We see in effect the substance of proverbs, which are the maxims of vulgar science, is the same amongst all the ancient nations, and their aspect varies after the diverse modifications of these nations.⁵

The knowledge of this language pertains to this science. If the learned would condescend to employ their researches on it, they could compose a mental vocabulary common to all articulate languages, as well ancient as modern. Vico himself gave an attempt at this vocabulary in the first edition of the *New Science*.⁶

Vico then briefly sums up the result of the foregoing axioms, which we have translated. The first, second, third, and fourth give the means of refuting all the opinions received up to this time on the origin of humanity. These

¹ *Degli Elementi*, xviii.

² *Ibid.* xx.

³ *Ibid.* p. 100.

⁴ *Ibid.* xxii.

⁵ *Ibid.* xix.

⁶ *Ibid.* p. 108.

means are found in the improbability, absurdity, contradiction, and impossibility of such opinions. The propositions which follow from the fifth to the fifteenth give the foundations of truth, and will serve to make us contemplate the world of nations, in its eternal idea or in its type, by this property of all science indicated by Aristotle: *Scientia debet esse de universalibus et æternis*. The last axioms from the fifteenth to the twenty-second give us the foundations of what is certain, and will serve to recognise, after facts, the world of nations, such as we have determined it in idea, according to the philosophic method of Bacon, that is to say, in taking as the point of departure natural things, on which he wrote his book *cogitata visa*, and in applying his method to human and civil things.

Proofs are then adduced by Vico to show that the world of nations commenced by religions. And this is stated to be the first principle of the three upon which the New Science is founded.¹

When nations are rendered savage by war, so that human laws can no longer be respected by them, the only power capable of subjugating them is religion.²

This axiom displays to us how, in the state of barbarism, Divine Providence arranged violent and terrible means wherewith to conduct to civilisation, and organise nations, awaking thus amongst those nations a confused idea of the Divinity, which they applied falsely by reason of their ignorance, but which, by the terror of such a Divinity being imagined, served nevertheless to bring them to a certain order.

When men are ignorant of the natural causes of things, and when they cannot render even approximately an account by comparison of similar things, of which their causes are known, they attribute to things their own nature. As the people, for example, say:—"La calamita esser innamorata del ferro."³

This axiom is only a result of the first; that is to say, that

¹ Degli Elementi (Works, vol. v.), p. 106.

² Ibid. xxxi.

³ Ibid. xxiii.

when the human mind, whose nature is indefinite, finds itself plunged in ignorance, it makes itself the rule of the universe.

The Physics of the ignorant are but vulgar Metaphysics, by which they attribute to the will of God the cause of the things they are ignorant of, without considering the means employed by the divine will. — “*La Fisica degl’ ignoranti è una volgar Metafisica, con la quale rendono le cagioni delle cose ch’ ignorano, alla volontà di Dio, senza considerare i mezzi de’ quali la volontà divina si serve.*”¹

A quality proper to human nature has been pointed out by Tacitus, when he says — *Mobiles ad superstitionem percussæ semel mentes*; that is to say, that men, struck by the terrors of superstition, refer to it the cause of all that they imagine, or see. Astonishment is born of ignorance; and imagination is more vigorous as reason is more weak.²

The most sublime result of poetry is to give to insensible and inanimate things senses and passions. It is a property peculiar to children to take in their hands senseless things, and to play with them, talking to them as they would with living beings. This philologico-philosophical axiom teaches us that in the infancy of the world men were naturally poets.³

There is a golden saying of Lactantius, in speaking of the origins of idolatry:—“*Rudes initio homines deos appellârunt sive ob miraculum virtutis (hoc vero putabant rudes adhuc et simplices) sive, ut fieri solet, in admirationem præsentis potentia; sive ob beneficia quibus erant ad humanitatem compositi.*”⁴

Curiosity is a faculty proper to human nature. It is the daughter of ignorance, and becomes the mother of science. It proceeds thus: after an extraordinary effect, such as a comet, a parhelion or star in midday, has arrested its attention, it seeks immediately what such a thing may signify.⁵

Sorcerers have always been wicked and barbarous; for it is told that to celebrate the mysteries of their sorceries they have not recoiled from all sorts of cruelties, even the murdering of unhappy children!⁶

¹ Degli Elementi, xxxiii.

⁴ Ibid. xxxviii.

² Ibid. xxxiv.—xxxvi.

⁵ Ibid. xxxix.

³ Ibid xxxvii..

⁶ Ibid. xl.

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 of Vico is borrowed from Plato, and it is unnecessary
 more than point out its erroneousness.²

“Since then,” says our author, “it is true that the world
 f nations has been made by men, let us see what are the
 things upon which all men always have been found to agree,
 and still agree.”—The knowledge of these things may indicate
 to us the universal and eternal principles after which all na-
 tions arise and are preserved. We may observe, then, that
 all nations, barbarous or civilised, separated by time and space,
 observe the three following human customs:—All have a re-
 ligion; all solemnly contract marriages; all bury their dead.
 Amongst the most savage, and the most cruel nations, there
 is no human act celebrated with more pomp and solemnity

¹ Scienza Nuova, Works, vol. v. p. 137

² Ibid. p. 139.

This proposition, with the two following definitions, constitutes the principle of strict reason, which has for its rule civil equity; it is with the certainty of this civil equity, or with the particular determination of these words, that barbarians content themselves naturally; and it is after this that they determine their law. Ulpian says often.—“*Lex dura est, sed scripta est;*” but we can say, in more elegant Latinity, and with a more appropriate signification—“*Lex dura est, sed certa est.*”¹

Wise men define Right as all that is necessary for the just utility of things: — “*Gli uomini intelligenti stimano diritto tutto ciò che detta essa uguale utilità delle cause.*”²

Truth in laws is a shining light which illustrates natural reason; this is the reason why the juriconsults say indifferently, *verum est*, or, *æquum est*.³

This definition, as well as the sixth, are particular propositions that furnish us with proofs for the particular subject of the natural law of nations, which we propose to treat of. They are derived from the two general propositions contained in axioms ix. and x.⁴, where the question is of the true and certain.

The natural equity of human reason entirely displayed, is but the exercise of knowledge in the domain of utility; for wisdom in all her grandeur is but the knowledge of using things according to their nature.—“*L’equità naturale della ragion umana tutta spiegata è una pratica della sapienza nelle facende dell’ utilità: poichè Sapienza nell’ ampiezza sua altro non è che scienza di far uso delle cose, qual esse hanno in natura.*”⁵

These axioms, says Vico, give us the principle of beneficent reason regulated by natural equity. And all these six last propositions establish, that Providence has been the ordainer of the natural law of nations. Knowing that nations must live during many ages without knowing the truth, or the natural equity of which philosophers later make the discovery,

¹ Degli Elementi, Works, vol. v. p. 136.

² Ibid., lib. i. axiom cxii. This definition is rendered by the French translator thus:—“*tout ce qui est nécessaire pour la distribution équitable de l’utilité.*”

³ Degli Elementi, axiom cxiii. ⁴ *Ante*, p. 60. ⁵ Degli Elementi, axiom cxiv.

Providence has permitted nations to observe certainty and civil equity, scrupulous guardians of the language of the laws: Providence has permitted that these laws should be generally observed even whilst their observance has appeared severe, for thus was the preservation of nations assured.¹

The fact of these propositions being unknown to the three chiefs of the doctrine of the natural law of nations,—Grotius, Selden, and Puffendorf—has caused the error into which they have fallen in establishing their systems; because they believe that natural equity in its most exalted idea was understood by the pagan nations from their origin, whereas two thousand years elapsed before the philosophers arose. For they had not amongst them a people peculiarly assisted by the true God.

Vico then attempts to show that the successful study of the social science is easier than that of the natural sciences. The civil world has certainly been made by men,—“questo mondo civile eglé certamente è stato fatto dagi uomini.” It is then possible—for it ought to be done—to discover the principles of it in the modifications of the human mind. He then states his astonishment at philosophers attempting to discover the science of the natural world, for God alone, who made it, knows and possesses its law; whilst the same philosophers neglect to meditate on the world of nations, or the Civil world: and nevertheless this, being made by men, could be known and explained by human science. This sentiment of Vico is borrowed from Plato, and it is unnecessary to do more than point out its erroneousness.²

“Since then,” says our author, “it is true that the world of nations has been made by men, let us see what are the things upon which all men always have been found to agree, and still agree.”—The knowledge of these things may indicate to us the universal and eternal principles after which all nations arise and are preserved. We may observe, then, that all nations, barbarous or civilised, separated by time and space, observe the three following human customs:—All have a religion; all solemnly contract marriages; all bury their dead. Amongst the most savage, and the most cruel nations, there is no human act celebrated with more pomp and solemnity

¹ Scienza Nuova, Works, vol. v. p. 137.

² Ibid. p. 139.

than religious ceremonies, marriages, and interments. In the preceding aphorisms it was laid down that uniform ideas originated amongst people who knew not one another, must have a common principle of truth. Something has without doubt taught all nations these three origins of civilisation, and all must religiously observe these customs, that the world may not again become barbarous. This is the reason which led Vico to consider these three eternal and universal customs, and to make them the three first principles of this science.

Each of these propositions is supported by historical proofs, although Vico appears to forget that the most civilised nations for a long time burned not buried their dead. "It is with reason," says Vico, "that interments have been named *Fœdera humani generis*, and that Tacitus has called them, with less grandeur, *humanitatis commercia*." It is besides an opinion, in which all the Gentile nations have agreed, that souls remained unquiet upon the earth whilst their bodies were without sepulture. All then have believed that the soul did not die with the body, but was immortal. Finally, on this subject the conclusion of Seneca may be quoted:—

"When we speak of immortality, the consent of mankind in fearing or worshipping the shades has no light weight with us: I use the public conviction."—"Quum de immortalitate loquimur non leve momentum apud nos habet consensus hominum aut timentium inferos aut colentium: hac persuasione publicâ utor."¹

Vico concludes the first book of the *New Science* by a chapter on the method of his work.

This science, as has been laid down in the Aphorisms, must commence with the subject or matter of which it treats. Philologists have sought its elements in the stories of Deucalion and Pyrrha, in those of Amphion, in the Cadmus' men born of furrows, or in the oaks of Virgil; Philosophers in the grass of Epicurus, the grasshoppers of Hobbes, the idiots of Grotius, and in men such as Puffendorf has described, as thrown on the world without the care or aid of God. But we must commence to inquire, whence the human mind

¹ *Scienza Nuova*, Works, vol. v. p. 144.

began to think. Men in their savage state can be drawn from barbarism only by a terrifying idea of the Divinity. The fear of God is the only means of bridling their ferocious liberty. Vico says, that in order to find the way in which this first human thought must have presented itself to the Gentiles, he devoted himself for twenty years to painful researches. In order to attain the proposed end, it is necessary to find an idea of God, such as men, although savage, fierce, and cruel, may not be deprived of. This idea of God can thus be explained. Men despairing of all natural assistance capable of saving them, seek to rest on something superior to nature. This thing superior to nature is God.

But the first men, who later became the princes of the Gentile nations, must have had a spirit troubled and agitated by very violent passions,—that is to say, by brutal passions. We will be obliged, then, in order to find the origin of the terrifying image of the Divinity, which checks the passions of men, and renders them human from being brutal,—we will be forced, we say, to have recourse to vulgar metaphysics such as indicated in the Aphorism, metaphysics which were also the theology of the poets. It is from this thought of terror that effort is born, a faculty proper to the human will, by means of which the wise man and the citizen put a check upon the emotions impressed by the body on the mind, whether it rules completely, as with the wise man, or gives them a better direction, as with the citizen. This power of checking the movements of the body is certainly the result of the liberty of the human disposition, and of free will, which is the domicil and abode of all the virtues, and especially justice; for the will, instructed in all that is just, determines all right.

But the corrupt nature of men permits self-love to tyrannise over them, and draws them exclusively towards their particular advantage. Hence Vico lays down that man, in the savage state, regards only his own safety. Later, he takes a wife; he has children; he loves his own safety along with that of the family; arrived at the state of citizen life, he loves his own safety along with the safety of the State; when empire is extended over many nations, he loves his own safety along

with that of the nations ; when nations are united in war, peace, alliance, and commerce, man loves the human race. In all these different circumstances man is chiefly occupied with his own advantage ; but he is conducted by Divine Providence through successive developments, to maintain, with justice, the state of the family, the civil society, and finally the society of mankind ; by means of which ordainment Man, not being able to attain what he wishes, is willing to content himself with utility, — that is to say, with what is just.¹

Hence the New Science, in one of its principal aspects, must be a civil and ratiocinated theory of Divine Providence — “ una Teologia civile ragionata ”² della *Providenza Divina* — which seems to be still wanting. For it is yet unknown to philosophers, such as the Stoics and Epicureans ; some of whom say that a blind concourse of atoms agitates, some that an invisible chain of causes and effects draws, the affairs of men. Whence Natural Theology is called *Metaphysica*. In which respect they contemplate this attribute of God, and demonstrate, by the physical order which they observe in the motions of bodies, as spheres and elements, and considering, at length, Providence as the final of the other natural phenomena which they here remarked. And, nevertheless, with regard to the economy of civil things, they ought to consider, with all propriety, the term itself, since Providence has been called Divinity, from *divinari*, to divine ; that is to say, to understand the things unknown to men, such as the future, or the things hidden in men, such as conscience. And what properly occupies the first and principal part of the science of Jurisprudence, are divine things, on which depends the second part, its complement, which are human things. This science should, therefore, be a demonstration of Providence as an historic fact ; for it should be the history of the laws which Providence has given to the great society of mankind, without the assent or advice, and often in a manner opposed to the projects of men. For although this world has been created in time and space³, the laws by which it is governed are universal and eternal.⁴

¹ *Scienza Nuova*, Works, vol. v. p. 149.

² *Tr. raisonnée.*

³ *Particolare — dans l'espace.*

⁴ *Scienza Nuova*, Works, vol. v. p. 148.

In the contemplation of an infinite and eternal Providence this science finds certain Divine proofs which confirm and demonstrate it. For Divine Providence having for its servant omnipotence, must explain its laws by ways which are as easy as the natural manners of man: having for a counsellor infinite wisdom, it must dispose all in perfect order; having for an end its own great goodness, it must direct its work towards a greater and more perfect good, than that which men have proposed to themselves. Throughout all the deplorable obscurity of the commencement, and the innumerable variety of the customs of nations, what more sublime proofs could we desire on the Divine argument which contains all human things, than in the nature and order of events, and their end, which is the preservation of the human race. These proofs will appear luminous and distinct if we reflect with what facility, and on what occasions, events arise, which, from the most remote distances, and contrary to all human foresight, take their assigned places. Such are the proofs of Omnipotence. We must then combine them, and see how things arise in the time and place suitable for them, and how others wait to spring forth in their turn, which constitutes, according to Horace, all the beauty of order. We must acknowledge in these facts the proofs in favour of eternal wisdom. Let us consider finally, as well as we have the capacity of attention, if any other Divine benefits could be produced in place of those which we have received on the occasions and at the time when these events have happened, and acknowledge that nothing could more contribute to the satisfaction of men, or turn aside from them the evils with which they are menaced, and behold what are the proofs which have been given of the eternal goodness of God. Now the continued proof, which Vico undertakes to present in the *Scienza Nuova*, of the direction of the affairs of the world by Providence, consists in this, that the human mind cannot find in the series of possible things which it is permitted us to understand, any other causes for the effects of the Civil World. In doing this, the reader will experience in his own person a Divine satisfaction by the contemplation of this world of nations, through all the

distance of places, and the variety of time. He will be able to convince the Epicureans that their Chance cannot err blindly and without rule, and the Stoics that their Eternal Chain of causes by which the world is held, is linked to the all powerful, wise, and beneficent rule of a God supremely good and great.¹

In order to discover the nature of human things, this science proceeds by a severe analysis of human reflection on human necessities, and on the utility of the social life, the two inexhaustible sources of the natural law of nations; "*i due fonti perenni del diritto natural delle genti.*"

In considering it under this aspect, this science may be called the history of human ideas, after which, it seems, ought to come the metaphysics of the human mind. This science Vico designates the queen of sciences, for, as the sciences should commence where the matter and subject of which they treat commence, this science will commence in effect with the first thoughts of the first men, and not with the first reflections of philosophers on human ideas.²

In order to determine the times and places where the events of this history arose,—that is to say, in order to determine the epoch and country of human thoughts, and to supply this history with chronological, geographical, and metaphysical proofs, this science employs a critical and metaphysical art in the search for the authors of nations. The historians of nations, with whom philological criticism is occupied up to the present time, come a thousand years later. The criterion which serves for this science is that already indicated in the Aphorisms, and which has been given to all nations by Divine Providence; it is the common sense of the human race which is determined by the conscience and the necessity of human things, which conscience and necessity form the whole beauty of this Civil World. In support of this science, there will be found this sort of proof,—that is to say, that the laws of Divine Providence being once established, the progress of nations cannot be different from that which it has been in reality, if even infinite worlds

¹ *Scienza Nuova*, Works, vol. v. p. 149.

² *Ibid.* p. 150.

should yet arise out of eternity. This science, at the same time, will describe an ideal eternal history, in which all nations will march with an equal step, during their progress, their decline, and their fall. He affirms yet more; for this world of nations having been made for man, man can find the modifications of it in his own mind; in such fashion that he, who meditates in this science may, by means of this formula, **MIGHT, OUGHT, and SHOULD**, relate to himself this history.¹

This science then proceeds, says Vico, like Geometry, which of itself creates a world of greatness, in constructing it with its own elements; but with so much the more reality, as the regulations about all things to be done by men were beyond points, lines, surfaces, and figures.

In the definitions of the True and Certain, it was above laid down, that men were not for a long time capable of understanding truth or reason, which are the fountains of eternal justice, and satisfy the intellect of man. This was practised by the Hebrews, who, enlightened by the true God, were prohibited by his Divine law from unjust thoughts. With this no mortal legislator embarrassed himself. For the Jews believed in a God, all mind, who penetrated the heart of man, — “in un Dio, tutto mente, che spia nel cuor degli uomini:” — but the Gentiles believed in Gods formed of mind and body. Philosophers who have treated of this came two thousand years after the foundation of nations. During this time men were governed by the certainty of authority, — that is to say, by the very criterion which critical metaphysics employ; or, better still, by the common sense of mankind, on which reposes the conscience of all nations. Viewed in this way, this science may equally be called the philosophy of authority, which the moral theologians consider as the science of external justice, on which authority must rest the three principal writers on the natural law of nations, — and not on what is drawn from the writings of historians. For the historians could not know the authority which governed nations more than a thousand years before their appearance.²

These, then, says Vico, are the philosophical proofs to be

¹ *Scienza Nuova*, Works, vol. v. p. 151.

² *Ibid.* p. 152.

employed in the demonstration of this science, and absolutely necessary to all who wish to meditate on it. The philological proofs came afterwards, and are reduced to the following: —

First; that the mythologies, not distorted but in their natural sense, must be the civil histories of the early nations: these are naturally found amongst the poets.

Secondly; the heroic phrases, which are rendered with all fidelity of sentiment and all their propriety of expression.

Thirdly; the etymology of the primitive languages, which narrate the histories of the things which the words signify, commencing with the peculiarity of their origin, pursuing the natural progress of their changes of meaning, according to the order of the ideas after which the history of languages must proceed.

Fourthly; a mental vocabulary of human and social things, of which the substance is the same in all nations, but expressed through different modifications in different languages.

Fifthly; the false is separated from the true in all that through the long course of ages has been preserved by the vulgar traditions; for as has been observed in the Aphorisms, things preserved by entire nations and lasting many ages, must rest on a foundation of truth.

Sixthly; the grand ruins of antiquity, useless until this science, because they remained squalid, broken, and displaced, will throw a great light when they are polished, arranged, and set in their proper places.

Seventhly; upon all these things, as their necessary causes, are arranged all the results which certain history relates; all these philological proofs will serve to display to us, in fact, the things of which our meditations have given us the idea on the subject of this world of nations; following in this the philosophy of Lord Bacon, which is *cogitare, videre*; whence the philosophical proofs preceding the philological, authority will be confirmed by reason, and reason by authority.

Vico then recapitulates what he has said upon the establishment of the principles of this science. Since these principles are Divine Providence, the moderation of the passions by marriage, and the belief in the immortality of the

human soul attested by interments; and since the criterion which the science employs, namely, that which is felt to be just by all or the greater part of men, must be the rule of social life; in which principles and criterion agree the vulgar wisdom of all legislators, and the recondite wisdom of the most famous philosophers: here must be the bounds of human reason: whoever wishes to pass beyond such bounds must take heed not to pass beyond all humanity.¹

The second book of the *Scienza Nuova* is on the Poetic Wisdom. It is almost entirely critical; and there are only portions of it suitable to digest for our purpose. Wisdom is defined as the faculty which directs all the methods by which are learned the sciences and arts which compose Civilisation. “*Ella è sapienza la facoltà che comanda a tutte le discipline, dalle quali s'apprendono tutte le scienze e l'arti che compiono l'umanità.*”²

We must let Vico tell in his own words his proposition and classification of the poetical wisdom. Metaphysics is a sublime science, which has effected for the secondary sciences the division of the subject matters, which it belongs to them to treat of. The wisdom of the ancients was that of the theological poets, who without doubt were the first wise men of the Pagans. But the origins of things must have been rude: we must therefore make the poetic wisdom commence by a rude sort of Metaphysics; from which, as from the trunk of a tree, will proceed on the one side Logic, Morality, Economy, and Politics, as described by the poets; on the other, Physics,—whence Cosmography and Astronomy, which in their turn produce Chronology and Geography.

Vico then proposes to show how the founders of the Pagan civilisation imagined to themselves their Gods, by means of their Natural Theology and their Metaphysics; how, by means of their Logic they formed languages; by means of their Morality, created heroes: by their Economy, families; by their Politics, cities; by their Physics, established the principles of divine things. Thus the New Science is the history at once of the ideas, the manners, and the actions of

¹ *Scienza Nuova*, lib. i. finis.

² *Ibid.*, lib. ii., Works, vol. v. p. 158.

³ *La perfectionatrice.*

the human race. From this threefold history arise the principles of the history of human nature,—the same with the principles of universal history.¹

Treating the subject in this manner, Vico then discusses the universal deluge, the giants, the origin of poetry, idolatry, divination, and sacrifices. Many ingenious observations are made, interspersed with fanciful and absurd derivations, upon the origin of hieroglyphics, laws, money, the first language and literature of the natural law of nations. And from a comprehensive review of ancient history, sacred and profane, is deduced the corollary that Providence is the organiser of states and of the natural laws of nations.

The first governments were theocratical; the second heroic. The traces of the so-called ages of the Gods were prolonged into the succeeding heroic age, in the same way as the freshness of the waters of a mighty river is preserved long after the river and the sea are intermingled. Divine Providence brought men to fear a divinity, and submit to religion,—the only source of civilisation. The first idea which men conceived of the Divinity arrested them in their uncertain wanderings, and fixed them in the first habitable lands,—an event which must be considered as the origin of all territorial dominion. The strongest stopped in the elevated places which united the three conditions necessary for the establishment of towns,—the facility of being fortified, the salubrity of the air, and the abundance of water. Still employing religion as an instrument, Providence disposed men to unite themselves to women by the ties of marriage—the source of all rights. Hence families and states arose. Scarcely were these asylums formed when clients appeared; and the materials being ready, they were employed by the first agrarian law which founded cities on two classes of inhabitants,—the nobles and plebeians. Providence willed that the first states should be admitted to the aristocratic régime, because that this form of government has for its end the preservation of things in the state in which they are, and which species of immobility can alone make men lose the customs of brutish

¹ *Scienza Nuova*, lib. ii., Works, vol. v. p. 163.

life. Thus four elements concur in giving the impulse to civilisation, namely, religion, marriage, the institution of asylums, and the first agrarian law.¹

ART. III. — REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

[MINISTER OF JUSTICE.

It having been referred to your Committee to consider the expediency of establishing a minister of justice, they have directed their attention, *first*, to the question whether or not any necessity exists in this country for the functions of such an officer; and, *secondly*, to the consideration in whose hands, if any, those functions ought to be placed.

I. THE NECESSITY FOR A MINISTER OF JUSTICE.

Your Committee may observe, at the outset of this Report, that the establishment of such an office as that of a ministry of justice would not create new functions so much as it would centralise in one department many existing duties now scattered through various sections of State offices. It appears incontestable that every distinct branch of the business entrusted to the executive should be represented by a different official, and be transacted in a separate office. It would be no more unreasonable and no more inconvenient to compel any department of State to pay all the officials directly or indirectly connected with its routine of business, than it is to oblige the same department to administer, in respect to these same officials, a portion of our judicial system. For instance, there would be just as much reason for burdening the Home Office with the discharge of the salaries of stipendiary magistrates, as there is for attaching to that office the

¹ Scienza Nuova, lib. ii., Works, vol. v. p. 361.

responsibility of revising and correcting these same magistrates' decisions. Just as we have concentrated the duties of national finance in the hands of the Treasury, and placed our public commercial interests under the control of the Board of Trade, so it would appear to your Committee, all the duties connected with the supreme administration of justice ought to be discharged by one single authority.

Practically, however, even its lower functions are scattered through a variety of departments of State, and in a way that makes it sometimes difficult to define the exact limits of the authority exercised by each. To collect these scattered duties in one uniform system under a common hand, would seem to be one of the greatest improvements that could be introduced into the practical working of our administrative system; and your Committee have to notice, as the first cogent reason for establishing a Minister of Justice,

(1.) *The Necessity of some recognised Official to conduct the Administrative Parts of our Judicial System.*

Under these may be classed the exercise of the office of public prosecutor, which seems not to be vested at present in any particular department, though the Treasury, through its solicitor, generally acts in this capacity. The Home Office, however, the Board of Trade, the Post Office, the Mint, the Customs, the Excise, the Admiralty, and other departments, occasionally direct prosecutions; while in many cases there can be no question that the interests of justice are defeated by the want of any recognised officer to bring a suspected criminal to trial. In some of these the persons injured may be unable, and in others may be afraid, to bring the wrong-doer to a public trial; and there have been instances where the morality of the nation has suffered from the impunity afforded to transactions which, whether really criminal or not, demanded investigation before an adequate tribunal. The expediency of establishing some such officer has been so often admitted, that your Committee do not feel it necessary to dwell at any length on this part of the subject; but they would observe, that it would be convenient to

vest in any office entrusted with the duty of public prosecutions the analogous power of information and *quo warranto* vested in the Attorney-General. Under this head may be also classed the royal prerogative of pardon, and the power of remitting or diminishing the punishment of crime,—a function at present discharged by the Home Secretary. It seems to your Committee that such a duty would be far more fitly entrusted to a Minister of Justice than to a Secretary of State, whose other employments bear no necessary relation to such an office. And connected with this subject is that of the superintendence of gaols, and the general regulation of our penal system, now likely, from the discontinuance of transportation, to assume a far more onerous form than heretofore. This portion of the administration of justice is, either directly or indirectly, vested in the Home Secretary, who in some cases directly controls the arrangement of prison discipline, and in others exercises a partial superintendence through the inspectors of prisons. Here, again, your Committee would suggest, that a Minister of Justice is the proper functionary to be charged with the supreme management; and should reformatory institutions for juvenile delinquents be established, as it is to be hoped they will, by an act of the Legislature, the amount of supervision, if any, reserved for the Government, ought to be delegated to the same hands.

(2.) *The Necessity for some recognised Official to control Magistrates, and regulate our Judicial Establishments.*

There is nothing that tends more to the efficient organisation of any department than the establishment of one common centre from which all orders proceed, and under whose supervision all duties are carried out. At the same time, there is no portion of our civil service which so demands a separate head for its control as the department of justice; because there is none so distinct in its nature, and so important to the interests of the community. Nothing can be more necessary than that the system to which are entrusted the lives, liberties, characters, and properties of all, should work

smoothly and effectively, and that a prompt remedy should be applied to any obstructions that may arise within it. Yet the question *quis custodiet ipsos custodes* is often asked in vain as to many of our inferior judges, whose decisions are unchecked by the safeguards that are found in our Superior Courts, in a vigilant press, and an independent Bar.

It is true that nominally an appeal is open to every one from the unjust sentence, or oppressive proceedings, of any of our judicial officers. But the process is often expensive, cumbrous, and dilatory, and is calculated to deter, rather than invite, inquiry. Moreover there are cases in which, without the exercise on his part of any injustice or oppression, and in cases where there can be no appeal, it is desirable that the conduct of a judge should be investigated. He may be found incompetent for his business, or he may neglect his duties, or some mental defect may render him obnoxious to the public. In such cases as these it would be most desirable to have the conduct of the judicial officer in question calmly and, if expedient, privately reviewed by some superior authority, who should have in his hands the power both of reprimand and of dismissal.

As far as unpaid and stipendiary magistrates are concerned, this desirable system of control is at the present time vested in more hands than one, and is most imperfectly carried out. The Lord Chancellor has the power of removing unpaid magistrates for incapacity or improper conduct, and occasionally exercises the prerogative. The police magistrates are more directly under the control of the Secretary of State for the Home Department, to whom all complaints are addressed, and who occasionally remits their sentences. It appears to your committee that the Home Department is not the proper office to be invested with judicial functions, and to be endued with what virtually amounts to the power of an appellate court; and they conceive that an interference with a magistrate's decision ought to proceed only from a properly qualified Minister of Justice, fitted by his education and professional experience to weigh evidence and adjudicate on conflicting facts. They moreover submit to this Society, that to make any distinction in the matter of appeal between unpaid and

stipendiary magistrates is incongruous, and even mischievous, since it must tend to prevent uniformity in decisions. A concentration of this function in the hands of an official to whom the country might look for the exercise of a proper control over subordinate magistrates would be, in the opinion of your Committee, a great boon to public justice. It would probably, in the event of the appointment of a Minister of Justice, be found expedient to vest in his hands the sole nomination to magisterial appointments. Your Committee conceive that in the same hands should be placed the power of reviewing, modifying, and annulling the sentences passed on criminals by the county magistrates in Quarter Sessions and the Recorders of boroughs. Appeals are indeed made to the Court of Criminal Appeal, but these are only on points of law reserved by the Chairman or Recorder, and any impropriety in the sentence can be remedied only by the Secretary of State.

An example has recently occurred in which a sentence has been mitigated by the Home Secretary on a representation made to him of the case; but here again your Committee would observe that this functionary is not the proper one to exercise such a power. Moreover at present there is no means of administering a rebuke to the individual by whom a cruel or unjust sentence is passed, a pardon or a mitigation of punishment being the only feasible mode of rectifying the injustice.

Passing to another portion of our judicature, your Committee remark that the supervision over County Courts is confided, as far as any effective supervision exists, to the Lord Chancellor, with the exception of the Court in the duchy of Lancaster, which is under the control of the Chancellor of that duchy. The latter official is not necessarily a person of legal attainments; and it would be desirable to place the Courts in the duchy on the same footing as those in the other parts of the kingdom. Your Committee conceive that all our County Courts should be under the immediate control of a Minister of Justice, having for his local assistants the Treasurers of the Courts, who should be independent and able functionaries.

Your Committee conceive that the importance of having some recognised and powerful functionary to supervise the arrangements of our judicial establishments, to correct any abuses that may grow up within them, to see that their records are properly made up, and safely kept, and to keep their expenditure within proper bounds, can hardly be over-estimated.

Hitherto no constant controlling action has been exercised in England over our judicial officers of any grade; remedies having only been applied in flagrant cases, and to meet urgent and importunate complaints. The course of the controlling power, your Committee venture to think, should be constant and continuous, and directed rather to the prevention than to the cure of evil. This can only be accomplished by the exertions of a public officer expressly created for the task.

(3.) *The Necessity of some recognised Official to carry out necessary Amendments in the Law.*

Your Committee are further of opinion that the constant alterations and amendments requisite to be made in every system of municipal law, in order to keep it in harmony with the changing wants of the age, are of themselves sufficient to demand the creation of some department especially charged with the care of public justice. It is probable that no code could be framed which would not be found, in the course of some years, uncertain and imperfect in some particulars; that of Justinian required the addition of the Novels during his lifetime, and that of Napoleon has become the subject of numerous commentaries and decisions. It is, at any rate, certain that our own law is very far from that point at which further amendments would be considered unnecessary; and and your Committee are of opinion that many of the difficulties that have attended Law Reform have arisen from the want of some authorised official to introduce measures framed to remedy the imperfections in our jurisprudence, to watch any bills that may be introduced by private members, and to take care that new enactments are in harmony with the rest of the statute-book. The necessity of some central authority, even for instituting inquiries into the existing condition of

our law, is shown by the number of detached Commissions now at work; which are separately obtaining information that ought properly to flow into one channel, and that ought to be obtained, not by irregular starts, but systematically and continuously. Your Committee conceive that a Minister of Justice charged, amongst other duties, with the office of discovering and remedying the inequalities in our legal system, might be the instrument of incalculable good, alike to the public and to the profession.

II. IN WHOSE HANDS THE MINISTRY OF JUSTICE SHOULD BE PLACED.

YOUR Committee conceive that it will be evident from the foregoing observations, that the Minister of Justice ought to be an official clothed with the highest possible authority and dignity, in order that due weight might be attached to his decisions in the many difficult and delicate matters that would continually come under his cognizance. At the same time it is desirable, in establishing any office, to make use as far as possible of existing machinery, and to interfere as little as may be with the present course of administration.

Many considerations point to the Lord Chancellor as the person to whom this important branch of the executive ought to be assigned. As the highest law officer in the realm, as the confidential adviser of the Sovereign, as the first in the ranks of our judges, and as the President of the highest court of judicature in the kingdom, the Lord Chancellor already combines many of the attributes of a Minister of Justice. At the same time, a considerable portion of the patronage which would attach to the office is already in his hands, and he holds a supervising power over the greater part of our judicial establishments. He is also a member of the Cabinet, a position absolutely necessary for the Minister of Justice, and he is generally selected by the ruling administration to bring before Parliament any contemplated alterations in the laws. To invest the Lord Chancellor with the functions of a Minister of Justice would therefore be, not so much to assign to him any new duties, as to complete those which he at present performs.

At the same time your Committee are fully aware of the multifarious and various occupations devolving on the Woolsack, and of the plea which may be urged, that any addition to those occupations might impede the due administration of justice. They are also aware that the qualities which fit a man for a high judicial position are by no means identical with those required for the due distribution of patronage and the necessary amendment of the law, and that more than one example has shown how widely they may be occasionally dissevered. It might be justly feared that were the Lord Chancellor, still encumbered with his present duties, to be invested with the recognised functions of a Minister of Justice, difficulties might frequently arise as to the selection of any individual at once qualified to pronounce the decisions of the court of ultimate appeal, and possessed of that frame of mind which can remedy and remould the various branches of our legislative jurisprudence. These latter considerations point strongly to a separate Minister of Justice, who should be independent of the Woolsack, who should not necessarily be a member of the legal profession, and who should, like the heads of the other departments of State, be seated either in the Upper or the Lower House, as the convenience of the public service might require. Your Committee cannot but be fully alive to the great advantages that would flow from having in the House of Commons, a Minister entrusted with the amendment of the law ; but to whosoever hands the important functions of a Minister of Justice may be entrusted, it is essential that they should be unencumbered with other duties, and be made as far as possible directly responsible to the Legislature.

Your Committee of course contemplate the establishment of a regular department of Justice, similar to those which regulate the Home Affairs, the Foreign Affairs, and the Colonies, with a staff properly subdivided and trained to its tasks, for the assistance of the head of the department in the discharge of his duties.

ART. IV.—THE HISTORY OF THE LAW AMENDMENT SOCIETY, FROM ITS INSTITUTION, IN 1844, TILL THE PRESENT TIME.

SECT. V.—*The Criminal Law.*

THE all-important, yet much-neglected Criminal Law, has not entirely escaped the notice of Law Reformers. A variety of circumstances has even forced it upon the attention of the country at large. The principle of the new Digest, so long advocated by Lord Brougham (the indefatigable President and father of the Society), so long acknowledged, yet postponed to make room for other more-favoured and less-laborious legislation,—ultimately received the sanction of Lord St. Leonards, and is now under the guardianship of the Lord Chancellor.¹ Party sentiment is willing to give way when grave considerations are brought upon the scene. Mr. D'Israeli admitted in his financial exposition that the time was convenient for the discussion of secondary punishment. The expense and difficulties of transportation appal our Chancellors of the Exchequer; the increase of population, and with it, of small larcenies, alarms the executive; the many-featured aspect of crime confounds the moralist; the misdemeanours of educated men embarrass the advocates of learning. The standard of security is shaken—the lovers of justice are either outraged at the reaction of undue mildness, or displeased by some unwise rigour; and the caprice of local tribunals causes the penalty for an offence to rest too much on uncertainty for the purpose of profitable example. Capital punishment encounters many obstacles: it is most difficult to inflict it without inviting a comparison between the sufferers; it has been found impossible to carry it out in every instance; it is equally a hard task to find a proper commutation of punishment. Under such emergencies, the efforts of enlightened men are ever received with thank-

¹ Lord Cranworth.

fulness ; and, whether they are the labours of Captain Maconochie, Mr. Hill, or Mr. Pearson, they are acceptable to such as look forward to a better state of society, and welcome to the Institution whose history we are endeavouring to trace. Captain Maconochie was for some time the Superintendent at Norfolk Island. He conceived, and not without reason, that there is another way to reach the feelings of ignorant men besides coercion or the lash. His mind was at once fully imbued with the expensive mischiefs of time-sentences, fixed rations, and unproductive imprisonments ; and, on the other hand, with the benefits of a graduated scale with regard to imprisonment, food, and labour. Captain Maconochie opened a debtor and creditor account with the criminal. To his credit he placed the fruits of his industry, the improvement of his morals, and his general fitness to return to society. To his debit was entered an amount of labour measured by a given number of marks registered in books kept for the purpose, by charges made in the same currency for all supplies of food and clothing, and by any fine for misconduct. Captain Maconochie would have this probation at first in a state of separate confinement, from whence, according to the number of his marks, novice should be advanced to the social state, *i. e.* to a class composed of from six to eight persons.

“ The members of such class to have a common interest, the marks earned or lost by each to count to the gain or loss of his party, not of himself exclusively.”

The Captain considers the ordinary mode of imprisonment to be a gregarious existence. He would exchange this for a social existence. He refers to tables as showing the partial success of his operations, but at the same time affirms that he was unable, for want of specific instructions and other difficulties, to put his system into full management. The Committee of the Society have considered his plans, pressed him with the objections which occurred to them¹, and having heard his answers, came to the conclusion that his efforts were highly deserving of notice.

¹ See the Report.

Mr. Matthew Davenport Hill is Recorder of Birmingham, and one of the Commissioners of the Court of Bankruptcy. He was also the leader of the Midland Circuit, and, in common with men of extensive practice, he had considerable opportunities of noticing the state of the Criminal Law and the condition of offenders. He is gifted with a kind and philanthropic spirit, and has expended much labour in striving to carry out his wishes for the bettering of those classes which are the most liable to temptation. Like many other thinkers, he is no friend to gaols or prisons in the sense familiar to the public, that is to say, as penal settlements; he would rather consider places of confinement as hospitals for deranged persons, it being his opinion that most criminals act in direct opposition to their personal interests—an unreasonable and insane course of life.

Mr. Charles Pearson is not more enamoured of gaols than the Recorder of Birmingham. He certainly would exchange profitless employment for useful and remunerative industry; he would draw forth the good, instead of imitating the evil, common to mankind. Rightly judging that those who are apparently the most hardened have many points at which they may be assailed with success, he would reject the tyranny and self-sufficiency of absolute power, and substitute a discipline not the less binding because tempered with kindness. Many persons are sceptical as to the value of these friendly undertakings. Some interpose the plausible objection that more care is bestowed upon the profligate than upon the labourer who works in honest obscurity. It may be responded that the English law which brands the greater number of stealings with the title of larceny, scarcely represents the philosophy of our enlightened times. Even the Mosaic ritual, a code of strictness, did not visit the ordinary act of thieving with a greater penalty than retribution. This wise principle of recompense is not merely without encouragement in our land, but, on the contrary, a composition for felony, if discovered, is the subject of reprehension and punishment. In truth, the offence of larceny, in a multitude of instances, taken abstractedly, is not of a higher moral dye than many deeds of men, whose dishonesty does not

come within the penal code. The man who runs into debt, who fails to pay his rent, who spends his earnings, and maintains a score at the public-house, very frequently passes through life without being involved in the breach of any positive law; yet he is scarcely a more honest person than the young pilferer whose early introduction to crime is rewarded by an immediate entanglement with the worst company, under the worst auspices, for a period sufficiently long to imbibe the worst principles, but too short to receive the least benefit from instruction. He is often whipped at the age of manhood, and sent forth with the donation of a shilling to wander home, as he may, a degraded and branded outcast. To such objects of sympathy, Mr. Pearson and Mr. Hill, together with many others, are zealous to render aid. They discard the objection that too much may be done for a convicted criminal. They equally repel the lax and careless indolence which shrinks from the adoption of a great scheme because idleness does not possess the capacity of understanding from whence the fruits of such a scheme are to be reaped. We do not live under a fatherly government. It is a fallacy to believe in such an opinion. We present to the world the example of a people scarcely rescued from the bloody volume of laws collected by King Alfred, a prince and just renown in his dark day, but unfitted to transmit a permanent code of jurisprudence to a late posterity. Troubled by the virulence of party, we hardly see the glimpse of a Law Reformer in office before he is either trammelled by his employments, or swept away by some political tempest. Hence, when a man abandons the course of daily gain for the kind purpose of benefiting the unhappy, when he leaves a while the plain track of the world for the more difficult road which leads to the promotion of social virtue, he finds that although he has few enemies, he has not many active helpers.

But there is an encouragement in the absence of hostility. Warm tokens of applause without much co-operation are better than open persecution; and there is no longer among the higher classes the licentious examples which formerly defied and frustrated the efforts of good men.

"Hostiles linguas, inimica que vinximus ora."

The Reformer then comes to his toil, animated with the pleasures of hope, and, we may add, inspired with the knowledge, that there is in the distance a more perfect condition of society. There needs, then, be no discomfiture to the labourers in the vineyard of reformation. And hence it is that the enlightened men who from time to time form themselves into Committees to look into matters of great public interest, have pronounced upon the plan of Maconochie, have sifted Matthew Hill's projects, and are now ready to take up and report upon any suggestions which may throw light upon the system of Secondary Punishment. As long since as December 1846, a Report was presented on this important head. And first, as to the old doctrine of *vengeance*, the Committee expressed their "heartly satisfaction" that it was now universally exploded. Warning or example should be held up as one principle, and reformation of the offender as the other.

To have arrived at these conclusions is not so easy an advancement as may at first appear, for many misdemeanours are so repugnant to our sentiments, as to create in the mind that very principle of retribution which a Christianised community is taught to control. Yet the Committee would retain the dread of suffering some pain, justly reflecting, on the one hand, that the laws of nature shrink from the certainty of an infliction, and that, on the other, our justice is so administered as to nourish in the breast of an offender every possible expectation of escape. Therefore they declared that "the best discipline is that which at the same time reforms the convict and inspires his associates with dread." The respective advantages and evils of our present gaols are then examined.¹ The tread-wheel finds no favour. It is almost valueless, with the additional irritation, that the prisoner knows he is doing that ill which the elements can do well. Of all antagonists to reformation that must be among the greatest which produces a perpetual source of anger. The Committee stated their opinion likewise, that

¹ See the Report at large.

the silent system was a fruitful cause of dissatisfaction, whilst it hardly added an unit to moral improvement. It might be, as they said, —

“An important step in the right direction, but still very far from being a perfect system; for in the first place it affords no opportunity for moral improvement, and in the next it is proved, in practice, almost impossible to enforce it with strictness. Moreover, it keeps the prisoners in a constant state of irritation, and instead of checking, arouses almost every bad passion.”

On the contrary, the separate system, according to the Report, works well.

“We do not mean solitary confinement, where the prisoner, without any occupation, is kept apart from any human being; but a cellular imprisonment, where, though strictly separated from all other criminals, the prisoner is daily visited by the governor, chaplain, surgeon, schoolmaster, trade-teachers, and other officers, of the establishment; and where, moreover, moral, religious, and intellectual training, and really useful labour are enforced.”

Pentonville, Reading, and Preston prisons, are those mentioned as affording the best examples of this discipline, and the great decline of committals as well as of re-committals as cited in support of the assertion. It would be out of place here to go more fully into the Report. It notices the plan of Mr. Pearson, the City Solicitor, which that gentleman explained at the Mansion House, in 1846, and winds up with the following recommendations: —

1. The abolition of all unrestrained intercourse in gaols.
2. The abolition of idleness, whether the prisoner be or not a convict.
3. The abolition of tread-wheel labour.
4. The compulsory building of district prisons.
5. The ensuring of separate accommodation for each prisoner.
6. The uniform introduction of useful labour; as, mat, rug, basket, or net making, tailoring, washing, shoemaking, sempstressing, knitting, &c.
7. The instruction of competent persons in those occupations.
8. The appointment of better Schoolmasters, with larger

salaries, and compulsory attendance at school on each day for a fixed term.

9. A competent resident Chaplain, whose undivided attention should be bestowed upon the prisoners.

10. The abolition of short sentences: *i. e.* sentences under one month.

11. The enforcement of a coarse, plain, and uniform diet.

12. The establishment of one or two large asylums for juvenile offenders¹ and other destitute children, on a somewhat similar plan to that proposed by Mr. Pearson; only taking care that the discipline is sufficiently severe.

This chain of thought was recognised in certain suggestions offered to the Society in January 1849, we believe by Mr. Pearson, but no Report was made upon them. These suggestions are inserted in the note.²

Unaggravated Larcenies.—If an information should be laid before a magistrate accusing the person complained of with the theft of a gooseberry pudding, or of some minced pies, or a loaf, or bundle of sticks, or any such article of small value, the justice must, if required, go through the processes of examination and commitment. The prisoner must abide his trial at the sessions or assizes, and three months may elapse before his innocence comes to be vindicated, or his guilt verified by verdict or confession. Now it is not purposed to palliate, far less to justify, small acts of dishonesty. Sometimes a considerable robber may be detected, for the first time, in the commission of a very trifling transgression, speaking by com-

¹ This plan is likely to be carried out by the Act of 1854.

² "That for the purpose of more economically and effectually punishing, deterring, and reforming criminals, it is expedient to award, in proportion to their crimes, labour instead of time sentences; and to render the duration of their imprisonment, and the quantity and quality of their diet, dependent upon their conduct in gaol, and upon the amount of their labour, having regard to their age, sex, and strength. . . . That by a judicious application of this system any number of prisoners, of the average age, health, and strength of the criminal class, may be made to procure food and clothing sufficient for themselves and the officers of the establishment by labour on land, and will be rendered more willing and more able to maintain themselves by honest industry when restored to a state of freedom."

parison. The neglect of little crimes would, doubtless, lead to insecurity of property; and the frequent escape of pilferers is owing not so much to the indifference of prosecutors, as to the difficulties and expenses of the proceedings. If we lived in a more perfect condition of society, or in a country where the offences known by the name of petty felonies were of rare occurrence, the costs of a trial by jury at the sessions and of maintaining the accused in gaol, might be acquiesced in with cheerfulness. Even the innocent man might not be disposed to dislike his country because of a temporary disquietude, occasioned by a system on the whole favourable to public morals and to the security of property. But the case is the reverse when a large expenditure accompanies the decision of tribunals upon charges of a lesser though most common character. The ends of justice are often defeated: sometimes by obstructions relating to finance; at other times from a reluctance to prosecute by reason of the distance from the place of trial, or lest the thief should be subjected to imprisonment for a trivial depredation. It could not be expected that so glaring a defect in our laws should elude the observation of intelligent reformers. Several meetings have been held upon this grievance at the Society's Rooms, and much consideration has been bestowed upon the means of improvement. Mr. Sergeant D'Oyly especially contributed his services to these discussions. The Juvenile Offenders' Act of 1847 "was to a certain extent" the result of a Report presented by the Committee. The Act, however, was limited to young offenders, whereas the Report recommended a *general* adoption of the plan. The District Petty Sessions, now the tribunal for the trial of juvenile thieves, was to be constituted a Court of Record. The offences to be tried were to be confined to charges of simple larceny of a small and limited amount, with a punishment also limited, and no conviction was to be followed by any of the legal consequences of a conviction for felony. Moreover, an option was advised to remit the question for the determination of a jury, either at the instance of the prisoner or at the discretion of the justices.

The Act of 1847 gave effect to the greater part of these

provisions, not excepting the clause of option on the prisoner's part, and a reservation of the justices' discretion. But it failed to admit the larger suggestions of the Report, and thus, as far as larcenies by persons above fourteen years of age were concerned, the ancient grievances remained unmitigated. A subsequent statute increased the jurisdiction, so as to reach offenders whose age should not exceed sixteen years.¹ The evils, therefore, with regard to adults are still in full existence. Jervis's Acts afford no aid in removing the inconvenience. The judges, some of them at least, are reported to have withdrawn their countenance from the change. We must, therefore, be content to await a more auspicious day, when the absurdity of sending persons charged with petty thefts to the gaoler in the first instance will be more strongly developed; when the necessity for avoiding a prison, if possible, in these lesser inquiries will be more powerfully urged; when the diminution of costs will be more clearly held up as an evil grafted upon an evil. It will be remembered that an amendment of so useful a nature has already secured the unanimous approbation of a learned and intelligent Committee.²

Registering or Licensing Places for Public Worship.—On the 7th of March, 1850, we believe, at Andover, a labourer was convicted of having allowed a greater number than twenty persons, besides his family and servants, to meet at his cottage and engage in religious worship. They sang hymns, preached, and joined in prayer. The offence was duly proved, under the 52nd Geo. III. c. 155., and the fine of 20*s.* (it might have been 20*l.*), was paid by a stranger present in Court. It was thought to be a hard case; but the plausible reply to this would be, that the toleration of Dissenters had been amply provided for; that a registry of the cottage was of

¹ See the Acts 10 & 11 Vict. c. 82., and 13 & 14 Vict. c. 37.; and the Report of the Society, *Law Review* for Nov. 1847.

² Mr. Aglionby has, we believe, withdrawn his bill for amending Criminal Procedure. Amongst other changes, he proposed to allow accused persons to plead "guilty" at Petty Sessions, and to receive their sentences at the higher tribunal. To this plan there are grave, if not decisive objections.

easy attainment; that no penalty could have occurred if the law had been complied with; that obedience to the laws is binding upon the citizen, if not from regard to social, at least to religious feeling; and that the mildness of the sentence could afford no just ground for complaint. But to this it might be answered, that a registry implies a peculiar form of worship. A building devoted to Sectarian observances would naturally be registered under such a title. We use "Sectarian" in the fullest sense, for even the Church of England comes within the scope of the statute. A house set apart for the worship of the Establishment would be so designated in the Registry; for the worship of the Roman Catholic religion in the like manner; so for the Baptists, Independents, and other separatists from an universal creed. It would follow as an inference, that the Protestant would not attend, except from motives of curiosity, the Roman Catholic tabernacle, that the Dissenter would not be found frequenting the Church of England house, and that the Churchman would seldom visit the conventicle. But as we are supposed to live in a Christian land, it may not be marvellous to find benevolent men who would preach the Gospel to ALL. That sentiment might almost be said to be in harmony with the mandate of the Great Master, who ordered the preaching to go forth to every creature. Such institutions, therefore, as the London City Mission, or the various Camp Meetings, or the Evangelization of rural districts, might not think it advisable to register under a particular denomination, lest by their adoption of Sectarianism they might exclude the world-wide objects of their toil. Those who would preach the Gospel judge that in agricultural districts they may discover places benighted as the tents of the heathen, and men who are unable or ashamed to come to church in obedience to the pious admonitions of their Rector. These advocates for worship judge that their countrymen have, like themselves, souls to be saved, and they freely sacrifice their time, their purses, and their labours to the extension of Gospel knowledge. Such zealots transgress against the law. But it is not expedient to assail a harmless tribe. The keeper of the unregistered cottage, where more than twenty are assembled, is

a misdemeanant, but there may be a want of sagacity or right feeling in visiting him with persecution. The nightly revel where more than twenty reek with luxury, remains undicted; the secret dwelling of the Unionists is respected; the doubtful congregation of politicians is not ventured upon; the abode of known agents of mischief is viewed with mere watchfulness; but there is an Act in force which prohibits the telling of the glad truths of our salvation to twenty strangers, in a house whose doors are open, unless that house be registered under the name of some special Act.

The conviction above alluded to came under the notice of those whose counsels tend to the amendment of the law. A Committee investigated the matter, and expressed their opinion in a Report. They said that there was a distinction between the armed, barred, and bolted conventicle of the days of Charles II., and the free open door of a rustic cottage. They discerned between the stern, perhaps melancholy hum of fifth monarchy men and the plain apostolic ordinances of praise and prayer. They could not bring themselves to recognise any evil in a free communion. If it were objected that

“Seditious teachings might be carried on in unlicensed houses, it seems evident that they can now be instituted and kept alive under various titles, avoiding that of being devoted to religious worship, and consequently being free from the penalties contained in the Statutes of Wm. & Mary, and Geo. III. Places intended for seditious preaching might be registered, and there seems to be no power to withdraw the registry when the fee is paid. There seems to be no law at present in force to prevent a society from meeting together (even with closed doors) or a lecture room from being opened, without a corresponding registry.”

The Committee remarked, in conclusion, that the system of objected that registering had ceased to work any advantage, whilst it might be easily used as an engine of punishment.¹

Disturbances of Public Worship.—If a person should come into a religious assembly and misconduct himself, it would seem to be a great scandal to the feelings of the con-

¹ See the Report, printed in 1851.

gregation if he were to escape without due punishment. On the other hand, if that punishment were to endure for three months, or if he were to be visited with a heavy fine, it might not be easy to prosecute such a person to conviction in the face of such severe measures. In the one case the law would be censured for its inability to vindicate itself, in the other the clergyman or minister might himself incur blame, not merely by giving countenance to the prosecution, but even by not interfering to arrest an apparently undue severity. According to the Toleration Act, the act of coming into any cathedral or parish church, chapel, or other congregation permitted by the Act, maliciously and contemptuously to disquiet or disturb it, brings upon the offender the burthen of finding sureties to answer the charge at the Sessions, and a fine, if convicted, of 20*l*. Another more recent statute of the reign of George III. doubles the penalty in the case of molesting a Dissenting place of worship. Now it may be remarked that the penalties upon those occasions are heavy, far beyond the purse of a labouring man, who is most frequently the transgressor. Hence arises the necessity for a leniency which encourages the fault. It seems likewise plain that in the instance of disturbing a church or other congregation, under the Toleration Act, there must exist a previous intention of creating a disquietude or disturbance before entering the building, as is evidenced by the words, "come into any cathedral," &c., "*and* disquiet and disturb the same." Hence the reluctance of magistrates to commit for the offence, because in the majority of examples the unpleasant and irreverent conduct arises without any proof of malice or contempt at first. The justice, therefore, is pressed with the severity of the law on the one side and with its insufficiency on the other. The statute of George III.¹ has no such controlling words, consequently the Dissenter is better protected than the Church with reference to mere

¹ An Act was passed in 1852, which made some alteration in the mode of registry, but was wanting in a remedy for the grievance mentioned in the text; in other words, it contained no repeal of the Registry Act.

² 52 Geo. 3. c. 155.

law, but he has not the less to encounter the severe penalties which seriously withstand the prospect of punishment. However, in 1851, a man was found disquieting the Divine Service in the Church of Whitchurch Canonorum, in Dorsetshire. An old statute of Queen Mary I. had been presented to the attention of the justices, by which it appeared that any justice may commit such an offender, provided that within six days he do examine into the matter in company with another justice. Then if the prisoner be found guilty by such justices, either upon his own confession or upon proof, he shall be committed for three months without bail, and further to the next quarter sessions. Then, at the sessions, if the offender repent he may be discharged upon finding surety for one year. If he refuse to repent he may be committed, without bail, till he becomes penitent.

All the proceedings before the justices were actually fulfilled in this man's case. And at the sessions, having expressed his sorrow, the disturber was discharged. Nevertheless it seemed strange that a Popish statute should be revived at the end of so many years to protect a Protestant ritual, and still more remarkable was it that authority was not wanting in support of the anomaly. There were, however, other technical difficulties connected with this case, which, unless well explained, might go far to show the danger of meddling with obsolete statutes.

It is not necessary here to enter upon the discussion of them. It is sufficient to say that the punishment in the principal case much outweighed the merit of the transgression, and the Report of the Committee of the Society upon this subject, to whom it was referred, entertains the same view. The Committee were of opinion that an ordinary summary conviction before a magistrate might be introduced, leaving the present statutes of 1 William and Mary (the Toleration Act), and the 52 George III. cap. 155., unrepealed. Care would be taken that a party thus punished should not come for the second time into jeopardy for the same act, and that he should be shielded from the heavy visitations of the Ecclesiastical Court. The infliction of a fine, not to exceed forty shillings, together with the payment

of costs, would, in the view of the Committee, compensate for breaches of decorum, which are more easily repressed when the proceeding is speedy and summary, and not embarrassed by penalties which admit of no mitigation.¹

Capital Punishment.—The punishment of Death cannot be said to have been entirely neglected upon examining the annals of the Society whose labours are under consideration. But there has been no Report upon the subject.

A paper was read by a member on the 11th of June, 1849, in which the question was discussed, and some articles have been inserted in the *Law Review* respecting the same matter.²

Confessions.—The subject of Confessions by Prisoners with reference to their admissibility in evidence has been constantly attended with embarrassment. It would be out of place here to enter upon the intricacies which involve this head of our criminal procedure.

The following propositions were once submitted to a committee, but no Report seems to have emanated :

“To render all confessions admissible in evidence except only such as are confided to a Roman Catholic priest in the course of confession.

“To render these last *inadmissible*. To render prisoners incapable of being convicted on their own confession, unless corroborated by some independent evidence.”

The Society has watched with care the systems for reforming juvenile offenders which have been the theme of discussion during the present Session. Two measures—the Middlesex Industrial Schools Bill, and the Youthful Offenders Bill, will probably be found amongst the Statutes at the end of the Session. The Report of the Society on the subject is worth consideration.³

¹ See the Report of the Society, Lond. 1851; and the case of Williams v. Glenister, 2 Barnewell & Cresswell, 699.

² See *Law Review*, vol. iii. p. 110. 433. The paper alluded to in the text will be found in the 11th volume of this *Review*, p. 168.

³ Report of 1854. The subject of Grand Juries has not escaped attention. Although there has been no Report, we believe that Mr. Wortley's Bill on this matter is still before the House.

SECT. VI. — *Of the Proceedings of the Society with reference to the Courts of Equity and Common Law.*

I. COMMON LAW. — II. EQUITY.

The public have little sympathy with dry details of technicalities. In the eyes of mankind, cheap justice and a short lawyer's bill constitute the *summum jus*—the highest notion of right. If they can avenge themselves of their adversaries speedily in the County Court¹, people care very little about special pleadings and demurrers. If they can be examined in their own cause, they have no particular concern with the rules of evidence. In venturing, therefore, upon an essay or history of a popular character, it does not seem necessary to dwell upon the innumerable mysteries, known to lawyers only, which, for the most part, belong to this chapter. A cursory account of matters so slightly interesting to the general reader, will probably afford ample satisfaction; yet there are points which must not be confounded with the universal distaste attached to mere legal discussions. Men cannot be said to be entirely passive in the decision of questions which may affect the validity of their wills, or the mode of Trial by Jury, or their liberty upon a disputed visitation of insanity; or again, their interests as witnesses generally in a Court of Justice, or their respective positions as debtors or creditors.

Such of these latter heads as have been touched upon in Reports will receive a rather larger share of notice.

It is now a circumstance of our legal history, that a plaintiff or defendant may be examined in a Superior Court of Justice as well as in a County Court, the only exception being the relation of husband and wife.² They may be heard on their own behalf, subject to a compulsory examination at the instance of their opponent. The Report of the Society investigated the objections which were obnoxious to the change. It repudiated the dangers of perjury as being greatly overrated; it dealt with the difficulty of misleading the Court and jury by averring that, upon most occasions, the

¹ And in *civil* suits, even this exception is likely to be withdrawn.

² We wish we could add, without the system of fees.

substantial truth could be told; it referred to the Bill of Lord Denman, which afterwards became law, as repelling in its results the alarm that interested testimony would necessarily be tainted with falsehood; it mentioned the examples of the Police Courts, Courts Martial, and the County Courts, as illustrations of the plaintiff's right to tell his own tale; it drew the contrast between the rich man who could afford to compel a disclosure in Equity, and the poorer suitor whose cause became hopeless through the privileged dumbness of his adversary; and concluded with a decisive opinion in favour of a measure which, three years afterwards, received the sanction of the Legislature.¹

And now that we are upon the subject of Evidence, we may just observe that the Act 8 & 9 Vict. c. 113., entitled "An Act to facilitate the Admission in Evidence of certain Official and other Documents," followed the Report of the Committee in very few months after it had been presented to the Society. If a public or official document appeared to be sealed as such, it was not inconsistent with good sense to allow it in evidence, without more proof of its authenticity. The speedy recognition of this improvement showed the soundness of the opinion proffered by the Report, and gave a sign of the general utility of the Institution.

The same may be said in some degree of the County Courts Extension Acts. On the 24th January, 1848, a positive resolution was come to by the Society that they had considered several written as well as printed statements on the subject, and that these Courts had "been the means of rendering justice to many thousands of persons whose grievances would otherwise have remained unredressed:" Other resolutions declared a readiness to attend to any objections with a view to render the new tribunals more efficient, and

¹ 14 & 15 Vict. c. 99. On the 9th December 1850, a resolution was passed, "That the secretary be instructed to write to the County Court Judges, to ask whether, in their judgment, the law which enabled parties to be examined as witnesses in County Courts had worked well or ill?" Up to January 21, 1851, it seems that forty-six answers had been received, forty-five of which were favourable to the examination, and one only hostile.—*Law Review*, February, 1851.

to co-operate with any endeavours to improve the Superior Courts.¹

Wills.—The Wills Act of 1838 was passed before the Society's operations had commenced; and the short Act of Lord St. Leonards does not seem to have been submitted to their ordeal. But a reference was made in May, 1845, "That in respect of wills made after the 1st January, 1838, the probate shall be *primâ facie* evidence of the validity of the will and its contents, in all actions of ejectment and other causes where the question at issue relates to realty." No Report, however, was made. And in January, 1846, the Committee on Common Law were instructed to "consider whether letters of administration should not be *primâ facie* evidence of the death of the party in respect of whose goods they were granted, and also of such party having died intestate."

Debtor and Creditor.—With regard to this important section of our jurisprudence, it was referred to the Common Law Committee—

"1st. To consider the present state of the laws relating to imprisonment for debt, and the means of giving more efficient and complete power over the property of, and punishing, fraudulent debtors. 2dly. To consider how far the process of County and other Courts for the recovery of small debts can be made consistent with the abolition of imprisonment for debt."

Mr. Commissioner Fane submitted a paper to the Committee concerning this matter, (which may be consulted as the offspring of an officer of great experience,) and concluded with these two resolutions:—

"1st. That the remedy given to creditors by seizure of goods under a *fi. fa.* is a delusive remedy; and 2dly. That such remedy instead of being beneficial to the creditor, whom it is intended and

¹ *Seq.* 9 & 10 *Vict.* c. 95.; 13 & 14 *Vict.* c. 61.; a Paper on the subject presented to the Society by the direction of the Council, Lond. 1847; another Paper received July 8. 1850.

supposed to assist, actually prejudices him by enabling the debtor more effectually to cheat him, under the forms of law; and therefore, as I humbly submit, this Committee ought to report to the Society, so far as relates to this branch of the subject, that the power which each creditor now possesses of seizing his debtor's goods under a *fi. fa. for his own exclusive benefit*, is a mischievous power which ought to be abolished."

Process, Pleadings, &c.—We are now coming upon dull ground. Yet if the dry tediousness of a suit at law be unacceptable in its detail to the reader, the Society may surely take credit for the unwearied trouble which it has lavished through its Committees upon so lengthy a labour. To have acquired a knowledge of the ancient intricacies of the Common Law is a merit: to have seen the necessity of unlearning, as it were, the science of a whole life, is a higher work of patience: to have arranged another code of practical jurisprudence is a toil deserving of approbation and sympathy. From the writ of summons which calls upon a man to defend a supposed transgression against his neighbour, to the judgment and execution which is intended to compensate the injured person, and the proceedings in error which threaten the ruin of bygone successes, the Committee have sifted every incident, with a view to the mitigation of expense, and the attainment of more speedy justice. The declaration or complaint; the answer to it, a many-headed monster, by which it was once competent to deny the existence of a debt, and afterwards to affirm that it had been paid, or that the debt was never owed, and then that six years had gone by since a promise had been made to pay it; the demurrer general and special; the replication, rejoinder, rebutter, and surrebutter: the whole record, with all its hidden shoals of departures and duplicities, the trial and judgment, and the judgment *non obstante veredicto*, by which the anxieties and fatigues of an inquiry are set at nought by some unforeseen omission or imperfect statement in the record: all these weighty matters have passed in review before the scrutiny of the Society, and they have materially aided the previous exertions of the Common Law Commission, and the more

recent ordinances of the Legislature. We will not, of course, attempt to follow the channel of a stream which has no lights and shadows to cheer its progress. We refer to a statute which contains 236 sections, and which received the royal assent on the 30th of June, 1852, in which the suit at law appears under new and, we hope, better auspices. It is the crowning reward of the labours of the Government Commissioners, and of the Society for amending our Law.¹

Printing Law Proceedings.—Within the last three years it was proposed as a matter for discussion—

“Whether it would be practicable and expedient that all proceedings at Law and in Equity should be printed in the first instance, and should in that form be originally filed and finally recorded.”

And the Committee on Common Law, after referring to the Scotch Law, and to the practice of the Judicial Committee of the Privy Council, came to a decision in the affirmative, subject to certain modifications which they pointed out in their Report.² The principles on which they formed this favourable conclusion were,—economy compared with the present usage, the superior legibility of print to manuscript, and the perfect uniformity of copies, and likewise a greater freedom from clerical errors. We are happy to be in a condition to observe that the substitution of printed bills in Chancery for parchment engrossment has been carried into effect by the statute 15 & 16 Vict. c. 86.

Action of Account.—The action of account, formerly only available in the cases of bailiffs and receivers, has fallen into disuse, preference being given, as Mr. Selwyn observes, to the mode of proceeding by bill in a Court of Equity. We are not aware whether any Report has ensued, but a reference was certainly set on foot in 1847, as to the propriety of reviving this action of account, “*particularly in the cases of*

¹ Those who are curious may refer to the Reports of the Society, especially those in 1848 and 1851.

² These modifications relate to actions at Common Law.—See the Report, Law Review for August 1850.

partners and agents." This revival might also embrace executors, and, indeed, most parties to computation where a privity existed between the principals.

It probably occurred to the advocates for the revival, that the Common Law process, controlled by modern practice, might prove more inexpensive than an appeal to the Court of Chancery.

When proceedings are carried on in Equity to obtain an account, they often involve a bill of discovery. And it was upon one occasion mooted with reference to bills of discovery generally, whether all communications between a client and his legal adviser should not be privileged as they now are *where the party interrogated is the legal adviser.*¹

A further modification of the maxim, *Nullum tempus occurrit regi*, has likewise been proposed for consideration. The rights of the Crown were in some measure mitigated by the statutes 21 Jac. I. c. 2. and 9 Geo. III. c. 16.²

And the great hardship of burdening a successful defendant with the costs of his struggle, upon the received maxim, that the Crown pays no costs, has not failed to attract attention.³

Seduction of Females.—The last matter to which we shall invite attention with reference to Common Law is a question which was submitted to the Committee in 1847,—

"Whether any, and what, alteration should be made in the present state of the law respecting the Seduction of Females."

The public may soon be undeceived if they imagine that the proceedings of these Committees have the character of a debating society. For, in this very instance, after several debates upon the matter, an Act was passed⁴ which stamped the offence of procuring the defilement of women as an indictable misdemeanor. Thus,—

"If any person, shall by false pretences, false representations, or other fraudulent means procure any woman or child under the age of twenty-one years to have illicit carnal connexion with any man,

¹ There has been no Report. The reference was made July 28. 1847.

² Dec. 8. 1851. No Report.

³ Dec. 8. 1851. No Report.

⁴ Royal assent, July 28. 1849.

such person shall be guilty of a misdemeanor, and shall, being duly convicted thereof, suffer imprisonment for a term not exceeding two years, with hard labour."¹

When it is considered that many of the legal Members of the House are likewise Members of this Society, the frequent relation of Acts of Parliament to the labours of the Society's Committees may easily be conceived.²

II. *Equity*.—If a disquisition on the quibbles of our ancient Law Process has been deemed too suspicious to be acceptable, much more may we not hesitate to unravel the net-work of Equity. Yet there are few who have not been personally or by tradition imbued with the terrors of a Chancery lawsuit. How many can testify with throes unutterable to the infelicitous gripe of Equity! The office of the Master, long likened to the stable which called forth the cleansing of Hercules, has been a bourne from whence return has often been sought in vain. Such a melancholy thought must have crossed the mind of the late Chancellor, Lord St. Leonards, (a master of his art) when he proposed in the House of Lords³,—

"That for the interest of the suitor the Lord Chancellor should have the power to direct that the dividends of claimants who are dead and gone should be applied to the expenses of the administration of justice, so as to relieve the Suitors' Fund." . . .

This was a true dirge. Bleak House, with all its colourings, can never rise to the realities of distress which have worn away the spirit of the client sickened by false hope. That mighty engine of Equity which was intended to mitigate if not to supersede the evils of the Common Law, became, in its turn, a more fearful and continuous scourge. It is even now in the ascendant, for whilst men are partially aided by the County Court, or forbear with increased sagacity from the

¹ Sect. 1 of the statute.

² The question as to Unanimity of Juries has been discussed, although no Report, we believe, has followed. But the matter is at this moment in the hands of Parliament, and, upon a late division, the result was favourable to allowing ten out of twelve persons to give a verdict on *civil* trials.

³ Tuesday, Nov. 16. 1852.

conflict of the Superior Tribunals, neither their foresight nor their resolutions can save them with certainty from the visitation of Chancery. To say that several and vast efforts have been set in motion to control some of these miseries; to relate that meetings without number, even organised assemblies, have been gathered together for the common purpose of accomplishing improvement; that all the lawyers and the judges themselves have shown a disposition to arrest the tide of complaint, is to state that which every man of counsel would anticipate, — every wise man expect. And there is a difficulty in the attempt to do good, which none excepting such as make the experiment can realise to their own minds. With every will to do right, with all earnestness to render aid to a righteous cause, both lawyers and laymen have often entered the list, and as often have retreated from the contest. But what private industry could not effect, has been forwarded by a Chancery Commission, and by the exertions of an united body. — The star of Brougham has been a conspicuous beacon in the obscurity which shrowded the early endeavours after Equity Reform.

The Commission, composed of eminent advocates, worked well with the encouraging assent of the popular sanction, and the Society for the Amendment of the Law, not behind the sincerest labourers in this vineyard, have bestowed the flower of their talents upon the attainment of a lasting success.

"Hic quoque fit docta multa corona manu." 1

At first, sliding into the plausible error of previous Reformers, the Equity Committee sought out the means of bettering the condition of the Master's functions. That Committee, consequently, animated by zeal and laden with compliment, devised at length a series of measures which promised a more speedy action in the tardy machinery of the obnoxious officer. But the attempt did not give satisfaction. The root of the evil had not been reached. It was not the amelioration, but the abolition, of the system which was imperative. Passing over, therefore, the intermediate discussions upon the subject, and leaving the Reports for the

perusal of those who may wish to see the progress of this Reform, we give the Society's resolutions of the 12th of January 1852.

" I. That the present practice of commencing suits in Chancery before a Judge, of referring either the whole or part of the matters involved in the suit to the Master, and of reporting the Master's decision to the Court for its ultimate determination, is the cause of the greater part of the delay and expense of Equity proceedings.

" II. That suits in Equity might be most advantageously disposed of by the Judges sitting in Court or at Chambers as might best suit the circumstances of the case.

" III. That the Office of Master in Chancery, as at present constituted, should be abolished; and that with this view, vacancies in the office as they occur should not be filled up."

These resolutions were put from the chair and carried. On the 30th of June following, an Act received the Royal assent

" To abolish the office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient dispatch of business in the said Court." ¹ . . .

Management of Estates in Chancery.— Few persons who have travelled on our high roads before railways with their imprisonment of embankments and tunnels shut out the prospect, can do otherwise than remember the wild and weedy fields which the coachman would sometimes point out, with the significant speech: "That's in Chancery, sir." And, indeed, it was wont to look as though it had been born in Chancery.

" Infelix lolium, et steriles dominantur avenæ."

The honest coachman would sometimes put in a word about stubborn landlords, and litigious families, or tell a traditional legend of some owner of the estate who had gone away, and had never been heard of more. It might be

" Plus erat in gladio, quàm curvo laudis aratro :
Neglectus domino pauca ferebat ager."

¹ 15 & 16 Vict. c. 80.

It might be that obstinacy had ended in

“ Death — destruction — ruin — and decay ; ” —

but the laggard administration of a Court of Equity was pointed at more as a devouring giant than a practical evil which plain men might remedy.

The funds admit of no waste. But there have been beings entitled to a comfortable competence in government securities, whose months and years have declined in hopeless solicitude, whilst the Suitors' Fund has been fed with the produce of their rights.

“ The Suitors' Fund was instituted in 1739, when a sum of 35,000*l.* was ordered to be invested, and the dividends applied in payment to the Accountant-General, who was then appointed for the first time. This grant has been added to by different Acts of Parliament. It now stands in two separate accounts. It consisted at first of the unemployed cost that lay dead, and it has increased in little more than 100 years to the sum of 2,385,088*l.* 2*s.* 6*d.* This is the floating balance of the monies belonging to the suitors of the Court of Chancery. This is one account. There is another account, which is the interest and accumulation of interest on the first account. In 1847, the interest amounted to 100,292*l.* 1*s.* 8*d.* If this Committee rightly understand the facts, this interest proceeds from the balance of the suitors' money in the hands of the Accountant-General, as to which no order for investment has been made ; and which, though thus producing interest available for the purposes of the Court of Chancery, produces none to the real owner of the money, when it is handed over to him.”¹

In 1833, the Suitors' Fee Fund was established. It is most certainly true that out of the monies belonging to the Suitors in Chancery, the salaries of the Chancellor and other Judges of that Court were paid. This condition of things continued until the year 1852. The Society had paid some attention to all these mischiefs. They referred to their Committee the system of management then in use, and the Report consequent upon the reference embraced the conduct of the Court of Chancery with respect to real and personal estates, and the taking of accounts.

¹ See the Report. Lond. 1848, pp. 11, 12.

Sir W. Page Wood was, and still is, one of the ornaments of that Society. In 1848, the Report was made to which allusion has been made. In the session of 1852, Sir William brought forward, persevered with, and carried a bill for "The Relief of the Suitors of the High Court of Chancery."¹ Fees were abolished, and the Suitors' Fund was protected. The salaries of the Lord Chancellor and the Judges of the Court were directed to be paid out of the Consolidated Fund. And, moreover, the salary of the Accountant-General, till now enriched by brokerages derived from the suitors' money, was fixed permanently at 3000*l.* per annum.

The observation must not be omitted here, that a very early reference was made to the Equity Committee,

"To consider the expediency of relieving the suitor from the expense of the judicial establishment, and of placing this burden upon the general resources of the country."

The burden has been placed upon the Consolidated Fund.²

Thus far the personal estate which is entrammelled by this Court has been in some measure released. With regard to the real property, it is recommended that a certain number of persons should be appointed by the Court who should devote themselves exclusively to the duty of general management, and not, as at present, to the interest of each particular suit. They might be allotted to various districts, and thus a better class of persons would be induced to accept the situations,

"And the particular charges of each estate would be more proportionate to its value than at present. The smaller estates would then have the benefit of the best advice and knowledge that could be obtained, at a small expense." . . .

It is also proposed to take away the sale of estates from the Master's clerk, and to hand over this business to the new department of Receivers.

¹ 15 & 16 Vict. c. 87.

² See the *Law Review* for February, 1848.

Other matters referred to the Equity Committee were—

The mode of taking evidence in Chancery.

The Law of Charitable trusts.

The propriety of appointing a paid accountant in Courts of Law and Equity.

Professional accountants are also pointed out as the most proper persons to carry out this extensive and important branch of jurisdiction. And, lastly, with regard to official assignees, a term not, perhaps, too happily chosen,

"The Committee conceive that it is worthy of the utmost consideration, whether some officer should not be appointed whose direct interest it should be to collect and distribute the assets involved in the suit, and to bring it to an end, when this was from its nature possible.

"Such an officer should be paid by a percentage on the assets received in the suit." "These officers would properly fulfil the functions of receivers of personal estate, trading partnerships, and such like property, when the suit required such an appointment."

We refer, however, to the Report.

Lunacy.—"Semel insanivimus omnes" was a saying of Johannes Baptista. The debateable ground which lies between insanity and soundness is so vast as to invest the subject with no common gravity. The spirit of eccentricity often waits upon a person throughout a long life. The plague of madness sometimes arises in an unguarded moment, or with but little mercy, and cuts short an intellect of most enduring promise. The ancient aspiration, "Sit mens sana in corpore sano," may truly be a constant theme in the present day. In 1843, the number of lunatics in England and Wales exceeded 20,000. In 1847, they amounted to at least 23,000. Five thousand belonged to the higher and middle classes of society, about 18,000 were paupers. Even a higher estimate has been made of these unfortunate patients. Seeing, then, that aberration of mind is so sadly present among us, that a more polished state of society, without religious firmness, is rather favourable to the progress of the disease; and that the forms of the malady are so various as to require some measure of shrewdness to verify its existence; we turn to the valuable Report upon Lunacy, delivered in 1848, as containing an able explanation of the legal evils which surround the victim, and a body of suggestions which tend as well to mitigate the horrors of the misfortune as to secure the liberty of the subject.

It may be remarked here that the chief portion of our observations upon Lunacy will be found in the Report, which purported to detail the state of the law respecting the confinement of persons alleged to be of unsound mind.

There seem to be five classes of the insane: 1. Paupers and persons who are maintained in public asylums. 2. Chancery lunatics.¹ 3. Lunatics in private asylums, the paupers, and many others not being paupers, having their abode in a public institution. 4. Patients dwelling alone in houses where only one is received.² These houses are numerous in the neighbourhood of London, and we are not sure whether they are not called "one-eyed houses." 5. Lunatics who are under the care of their friends, and, consequently, are not subject to the restraint of any asylum.

Having made this enumeration, the next step will be to withdraw from the question the cases of the pauper and Chancery lunatics. The fifth class may likewise be laid on one side. Public charities of this day are so excellently conducted, so amply furnished with guards and shields of every character, so admirably disposed for the comfort and restoration of the inmates, so celebrated for the highest amount of benefit administered under their auspices, that not merely the destitute, but sufferers, we believe, of all ranks, are to be seen in their asylums, receiving aid through the contributions of their friends, and reaping the advantage of the best hope of recovery. With respect to the fifth class², in any case of notorious cruelty the Common Law is sufficiently powerful to interfere and inflict punishment. Looking at such lunatics in any other view, it must be obvious that the invasion of private domiciles with intentions ever so benevolent could not be permitted.

We have, therefore, two classes only remaining for consideration. The private lunatic asylum, and the dwelling

¹ Chancery lunatics are not numerous, by reason of the expense of working the commission. . . . And there is reason to believe that those who are under the care of the Chancellor are, for the most part, mercifully cared for.

² These patients are protected by 16 & 17 Vict. c. 100. s. 8. 15. &c., and there is now, besides, the statute 16 & 17 Vict. c. 70. s. 104. &c., which provides visitors for these unfortunate patients.

where one insane inmate only is received. Now it may not be generally known that any two medical men may give a certificate of insanity, and that such an opinion stands in the place of a jury with regard to the immediate liberty of the party to whom madness is thus imputed. Armed with this certificate, the relative or friend can arrest the supposed lunatic and remove him to one of the private asylums. By virtue of this medical instrument, there is a lawful caption, and, which is more, a lawful detainer. In a case of pressing urgency, or upon a representation to that effect, even one certificate will suffice for the time being; and as to the place of custody, notice of fourteen days is enough to warrant an application for a licence. Before the year 1845, this mode of incarceration without inquiry was scarcely open to any control; but such were the public complaints upon the subject, that the Legislature determined to appoint regular visitors, whose duty it should be to overlook the asylums of the whole country. Eleven persons were accordingly appointed to be Commissioners, and of these three physicians and three barristers were directed to visit. This was a right step towards the revelation of the truth of certificates under which people had been "immured for life." But the Committee did not deem this a sufficient safeguard. The visits of the Commissioners must indeed take place four times in the year within seven miles of London, and twice a year in the country. They may even visit at extraordinary seasons, and without notice. The visits of three magistrates, appointed at the Sessions, and in company with a physician, are likewise in operation to protect the unfortunate insane. Their visits take place four times during the year. The visits of relatives must not likewise be forgotten. Still there are reasons for requiring greater defences on behalf of individual liberty. A considerable interval takes place in many cases between the date of the first confinement and the examination of the lunatic by the Commissioners. This interval is long enough to bring upon a sane person the appearance, if not the reality, of madness. The approval of the magistrates does not seem to have prevented, upon some occasions, the occurrence of such hardships as demand a more strict supervision, *in the first instance*, of the

ability to deprive a person of his liberty. In the Report¹, (p. 7, note), it is stated, that "cases have been brought to the knowledge of the Committee in which an alleged lunatic has been liberated, whose first opportunity of appeal to the Commissioners was after ten months' imprisonment." This must have been *after* the statute. There was another case where the visits of the Commissioners being eight months apart, certain circumstances fit for inquiry happened in the middle of that interval, so that four months had elapsed before the fact of a supposed grievance could come under investigation. We do not travel for instances out of this Report, but it may be safely remarked, that kindred examples of undue confinement will arise to the recollection of many. The Report mentions a case of custody in an asylum for fourteen years; but this happened before the statute. It is noticed as an evil which could scarcely have existed in a *public* establishment, the outrage upon the captive being, that *he never had been insane*. This was the decision of a jury, and the event proved the imperious necessity for better legislation. Admitting with reluctance, if we were so compelled, the efficiency of the actual visitations now in force, if a house not forming part of the plan of the house licensed, but a building separate from it, should be appropriated to a patient, it seems that the visitors have no power of going into that separate house. It might be an evasion to construct such a building; it might present a different feature from a dwelling set apart *bonâ fide* for a solitary patient; but there is no legal right of entry into one of these single houses, unless the visitor be a member of the "Private Committee." This Committee consists of the permanent Chairman of the Commissioners and two other Commissioners—the one a physician or surgeon, the second a barrister. One or two members, according to the discretion of the Commissioners, are to visit. Their duty is to visit unlicensed houses, in which a single patient is received, at all reasonable times (unless such patient be so received by a person deriving no profit from the charge, or by a Committee appointed by the Lord Chancellor), and to report to the Private Committee on the treatment and state of health, both

bodily and mentally, of the patient. A copy of the Report may, if the Private Committee think fit, be laid before the Lord Chancellor. However, upon the request of the Commissioners in writing, it seems that a visitor may now enter even these sanctuaries.¹

It may be added here, that if in any of the separate houses in connection with private institutions,

“ ‘The rations of the patients are received from the original house, then it becomes a matter of serious question, whether or not the person holding such a house has the right to exclude the visitors from that house—whether he comes under the powers of the Act of Parliament—whether he can keep that house separate.’ ”

With all the precautions of the Statute, enough has been shown to warrant a Committee in advising that the law was not sufficiently watchful of private liberty. The responsibilities of the person who puts the medical machinery in motion; of the doctors who sign the instrument warranting the capture; of the party making the arrest; of the receiver of the lunatic; and of the kinsman or friend behind the curtain who contrives the detention; were extremely slight, and in some respects liable to no regulation nor retribution. The evils of an unjust confinement are aggravated by the delay which must elapse before inquiry can be made as to the justice of the imprisonment. The facilities of stifling complaint, or of shrouding the victim from view, are neither few nor improbable.

The Commissioner may be baffled even by a threat held out to the captive. The Magistrates, probably, deem their duty to be of a less scrutinising character than that of the Government visitors. The zeal of honest friends may be repelled by a tale of ill-health. Facts are disclosed which demonstrate the occasional failure of the statutory guardianship, and the triumph of iniquitous oppression. The Report, therefore, recommended, that before the liberty of any one should be taken away for supposed lunacy, “there should be a further opinion given by some person having a judicial character within a reasonable period to be determined by law, after the confinement in the asylum.” Whether this tribunal

¹ See 16 & 17, Viet. c. 96. s. 15.

should be the Masters in Lunacy, or the County Court, or the Magistrates at Petty Sessions, or a Jury at the option of the party seized, provided he were in a condition to exercise it, the Committee, without expressing any positive opinion as to the Judge, "are, on the whole, inclined to prefer leaving the matter to be decided on by some judicial person, on whom the responsibility of the confinement should entirely rest."¹ The statutes 16 & 17 Vict. c. 96, 97. have been passed with very laudable intentions, but they do not seem to add much to individual liberty; nor does the Act of the same year, c. 70., eradicate all the objections we have noticed.²

We now proceed to the second branch of the subject, which relates to the property of the Lunatic.

The Report goes on to say:—

"There is another very important portion of the subject for which the recent Act makes scarcely any provision at all: we mean as to the property of the person so confined. On a person being found a lunatic under a Commission from the Court of Chancery, the property is taken possession of by the order of that Court and is placed under the control of his committee; but when a person is declared to be a lunatic by certificate, no provision whatever is *necessarily*³ made with regard to his property; this is spent and appropriated as his relations or friends can best arrange. It may be quite true that in many cases it is properly managed; but, on the other hand, it is obvious that the door is open to great abuse in its management; and it cannot be doubted that many acts are committed, even with the best intention, which are not strictly legal, while in some cases it is certain that the property is fraudulently applied."

¹ Moreover, the writer would suggest that no person should be conveyed to an asylum before inquiry made into his case by a competent and impartial person. A magistrate might not be the officer best fitted for the purpose; but it might be forbidden to confine any individual till a Master in Lunacy or Commissioner should have had an opportunity of forming at least a *prima facie* judgment of his state of mind. There is a statute, the 3 & 4 Vict. c. 54., which confers extensive powers with reference to prisoners who appear to be insane. That Act severs to remove a certified lunatic from the decision of a jury; but as it has not been referred to by the Report of the Committee, it would, perhaps, be out of place to notice it further in this place.

² C. 96. an Act to amend 8 & 9 Vict. c. 100.; c. 97. an Act to consolidate and amend the laws respecting lunatic asylums; c. 70. an Act for the regulation of proceedings under Commissioners of Lunacy.

³ See, especially on the word "*necessarily*," note (2) of the Report, at p. 9.

The recommendation of the Committee was, that as soon as the fact of the lunacy becomes properly established, his property of all kinds should vest in an approved committee, to be administered for his benefit by the Masters in Lunacy, or by some local jurisdiction in the provinces.

“ The advantages which would attend on this proceeding would be that the property of the lunatic would no longer be left to the mercy of his relations or others who may get possession of it ; nor would the lunatic, on the other hand, be exposed to the ill consequences which frequently follow from illegal though often well-meaning acts. But such property would be duly received and administered. Proper allowances would be made not only to the lunatic himself, but also to such relations as had a just claim on him ; his real estate would be properly superintended, the buildings repaired, the moneys rightly invested, and the whole retained for the benefit of those interested, instead of being ill-administered, or possibly wasted and dissipated, as now too often happens.”

Further, the Report refers to the Royal Lunatic Asylum at Dundee, as one long established and well-conducted. We give one remarkable sentence of a Report of the Medical Officers of that Royal Asylum in 1847, wherein it is said :

“ We believe it is no uncommon thing for a patient, with a free income of several hundred pounds a year, to be restricted by his relations to a mere pittance — say forty pounds — that they themselves may look forward to the enjoyment of the surplus when he is dead. These valuable recommendations have been to a certain extent verified by the 16 & 17 Vict. c. 70.”

There was indeed an Act of modern date (June 30. 1852)¹ entitled “ An Act for the Amendment of the Law respecting the Property of Lunatics,” but it unfortunately embraced no proposition of the general and salutary character suggested by the Report under consideration. But the Act of 16 & 17 Vict. places the Property of the Lunatic more fully within the jurisdiction of the Masters in Lunacy, and gives them more extended powers. There is still a Committee of the Person and a Committee of the Estate, but the Masters have undoubtedly a greater hold over these committees than before the modern legislation on the subject.

¹ 15 & 16 Vict. c. 48.

On the 22nd November, 1852, it was resolved at a general meeting—

“That it is expedient that an appeal should be allowed to suitors who may be dissatisfied with, or aggrieved by, the decision in cases of insolvency.”

We have now gone through the various matters of Law and Equity, and on taking leave of a wide field of detail, not always very interesting, we repeat that the test of all the reforms of 1852 will be the attorney's bill, or the amount of fees charged by such barristers as may have the hardihood to practise independently of the attorney, and fearlessly of the frowns of great judicial officers. Unless these estimates, the *private* reckoning of the hereafter, can be materially reduced, the imaginary improvements will turn out to be but shadowy errors, and another more searching criticism must be set on foot to make the name of justice in our land dear to every breast, and common as a household word.

ART. V.—ARTICLED CLERKS.

A Manual for Articled Clerks, containing Courses of Study, as well in Common Law, Conveyancing, Equity, Bankruptcy, Criminal Law, as in Constitutional, Roman, Civil, Colonial, and International Laws, and Medical Jurisprudence; a Digest of all the Examination Questions, with the new General Rules, Forms of Articles of Clerkship, Notices, Affidavits, &c., and a List of the proper Stamps and Fees, being a Comprehensive Guide to their successful Examination, Admission and Practice as Attornies and Solicitors of the Superior Courts. Seventh Edition. By J. J. S. WHARTON, Esq., M.A., Oxon., Barrister-at-Law, Author of the “Law Lexicon,” and an “Exposition of the Laws relating to the Women of England,” &c. Butterworths. 1854.

AN articled clerk and an attorney's clerk must not, in taking up this volume, be necessarily considered as the same person. The custom of binding young men to serve for a certain time before they could be allowed to accept a retainer from the

suitor is of some standing. In 1729, when Sir Philip Yorke who was bred in an attorney's office, was Attorney-General, it was evidently the rule to enforce an engagement of this nature for four years. The Statute of George the Second then prescribed the increased limit of five years, and the Act¹ of Victoria, which consolidated the law upon the subject, re-established that term as the time of probation. And, again, the Statute of 1729 forbade more than two contracts in writing by clerks to serve the same master, a provision which is adhered to in the more recent enactment just alluded to. The articled clerk, therefore, is to be distinguished from the tribe of writers so often to be found in places of business. He is, in effect, the future solicitor. Whatever of value, of estimation, of importance, of responsibility, there may be in the profession, he is the person who, in a short time, may be involved in its duties, its obligations, and its honours. To the office of Coroner, to the labours of parliamentary agency, to legislatorial functions, in some cases to the dignity of a Judge of the County Court, — in a word, to many other appointments—an introduction lies at once upon the due and honourable fulfilment of the clerk's undertaking, and the discovery, upon examination, of an ordinary knowledge of his calling. We are not, consequently, surprised at the elaboration of the work before us, nor are we disposed to underrate its usefulness, nor the seasonableness of its appearance at the present moment. It should, however, be understood that the book is intended to be initiatory, or, to use one of the Author's phrases, inaugural. It is what the pupil is to learn that we find presented to us. Not his future liabilities to his clients, nor the remedies which the law permits adversely or in his favour, nor the legal incidents of his professional character, nor much indeed as far as agency is concerned. Very prudently, and we think properly, the Manual is the index to a course of study; and certainly if a youth can master the contents of it, he will be in a fair way to escape the imputation of ignorance.

We will just pass lightly over the catalogue of chapters in order that the matters intended for use may appear with more

¹ 6 & 7 Vict. c. 73.

distinctness. The introduction is composed of suggestions to the young tyro, and some of these are entitled to an abiding recollection. We will hear the writer's opinion upon lectures.

"Lectures are deemed to be aids to law studies ; and so they are, if properly conducted ; but I cannot conceive anything more imperfect than the conventional mode of delivering them. A lecturer reads a paper upon a given subject to a number of students ; cases and authorities for and against his positions are quoted ; he finishes his lecture, retires, and there is an end of it. A student goes away with a confused notion of the matter, which a simple question put to the lecturer might have cleared ; but no communication takes place between them, and he must seek for enlightenment elsewhere."¹

We fear that this is too often the dull exhibition of the lecture-room, but there have been exceptions: we believe that Professor Amos, at the University in Gower Street, was very accessible, and that it was not unusual for the student to put a question with a view to clear up any difficulty which interrupted his progress. And, undoubtedly, there are other honourable instances, although it may be some excuse for a lecturer, whose learning is heavier than his wit is sharp, to dread the approach of a querist, and, if assailed, to reply, that much may be said on both sides of the question.

Mr. Wharton prefers a fictitious moot court to the debating society.

"I fear," he says, speaking of the latter, "that argument is not so much aimed at as smart talking, or knowledge so much an object as wrangling, sophistry, and a majority."²

"If conducted under a president, who from his superior attainment can sum up the merits on both sides of the question with precision, and pronounce an authoritative judgment, which shall place the whole matter in an instructive light, great advantage may certainly be gained from such a mode of proceeding."³

We remember that this practice of summing up was adopted upon law discussions at the Forensic Society which flourished considerably at one period, and the application of

¹ P. 25.² P. 24.³ Pp. 24, 25.

the arguments by the President of the Society was frequently useful.

Our author is, beyond controversy, most sanguine in his hopes of perfection. If it is "taken for granted" that the articled pupil has acquired "classical, mathematical, and general knowledge, logic, and arithmetic, the French and German languages, politeness, and self-respect, virtuous conduct, or religious duty," the disciple will be a precocious model, even of modern education.

The Bar had better look to their supremacy.

Amongst other suggestions, the domestic relation between the clerk and the master is noticed. Mr. Wharton thinks that the association of Tutor and Pupil should exist in this case, but, in a majority of instances, he appears to liken the condition of the clerk to that of a servant. Tied down to a desk, copying forms and precedents, he is converted into a mere machine, or he runs about as a carrier of papers and server of notices.

Now without depreciating the value of legal literature, or seeking to discourage those pleasurable emotions of the mind which are excited by the prosecution of liberal studies, we are still of opinion that the young man should be careful to do as his elders have done before him,—that he should master the forms as well as the principles of his profession. And no doubt the writer of the "Manual" is of the same sentiment. We would only desire to moderate and sober down the love of high-reaching thought which might lead many of his readers to a hope of excellence which they could scarcely expect to realise.

In a letter from a grandfather to his grandson by a Mr. Phillips, formerly an articled clerk¹, there are some sensible observations touching this business of the desk:—

"Your first point is to survey the conveniences of your seat, and make it as comfortable as you can. Consider how many years you will have to pass there."

"The first thing which you will have to do will be, probably, some writing to copy. Do this as well as you can: take time about it."

¹ Published in 1828.

“When you have any writing to copy, endeavour, as far as you can, to understand it.”¹

These precedents, although they may partake of a character for plodding, are apt to lay a foundation for the successful man. Suddenly called to the bedside of a dying person, and compelled at once to reduce to form the instructions which he then receives, almost within earshot of jealous relations, the attorney, or sometimes even the articled clerk, must be able to make a will without recourse to his precedents. So with contracts. At markets and elsewhere it should be his habit (as it is the habit of great speakers) to put himself, in idea, in all positions, where his powers may be put into action, without opportunity for much reflection, or without recourse to his books. Neither do we feel quite confident that Mr. Wharton has not in some measure overestimated the obligations which he attributes to the principal with reference to his pupils. For the proficiency and well-doing of those who have entrusted themselves to his care the solicitor is bound to a serious concern, but that he is likewise committed to an arduous course of personal instruction is a question which might involve his duty to his *clients* as well as his clerks. Busy masters have not much time to teach. On a professional journey to and from the assize town, and upon other such occasions, valuable practical remarks may be gleaned from the principal; but we doubt whether the bustle of professional competition will admit of so enlarged a system of *teaching* as that which is insisted on in the present volume. It is beyond the powers of a barrister in large practice, whose vocation is less diffuse than that of the attorney, to maintain a career of successful pupilage. And we suspect that Mr. Wharton himself is not unpersuadable, for he very rationally remarks in another page:—“While the articled clerk is in London he should seek out a barrister, known to be a man well qualified in his profession, who has given some attention to law-education, and who will actually read with him, and explain and put ques-

¹ The books of *Simpson* and *Hooper* may also be referred to.

tions as the student goes on, after the manner which I have already laid down." We quite concur in this in cases where the additional expense can be afforded; for it must not be forgotten, that the introduction to the office itself is sufficiently onerous, and that further instruction must of course be productive of increased cost. And we will go further, and express our belief that a Pocket Companion, like that at the head of this Article, will be abundant in useful fruit; and, looking through it, it appears to us to be, as a whole, a commendable and excellent addition to our elementary Law Library.¹

We cannot regard Mr. Wharton as a thorough Law-Reformer. At least, there is not evidence enough in his book to enable us to award him that praise without distrust.

When a lawyer of 1854 quotes Lord Eldon as saying:—"Indulge the appetite for alteration in the Law, which we hear so much of now-a-days, and in a reign or two more we shall not have a lawyer—a well-grounded lawyer left,"² we confess to some degree of scepticism on this point.

Again:—"It has struck me very forcibly in my readings of the Statutes and Orders under them, especially those which have been passed and made during the last twenty years, that amidst the industrious novelty, a philosophical comprehensiveness, or a practical and scientific wisdom will be sought for in vain. Without a guiding principle—with an ignorance of the actual bearings of the subject—our ephemeral Law Reformers rush in where better and abler men would pause before they trod."³

Now this almost amounts to a denunciation of our present struggles for legal improvement. We are justified in be-

¹ It would seem from the index to books cited, &c., that the author has mistaken the historian of English Law in 4 vols. This writer was not *Chief Justice Reeves*, but *John Reeves, Esq.*

² Manual, p. 21.

"Sic fautor veterum, ut tabulas peccare vetantes,
Quas bis quinque viri sanxerunt, fœdera regum
Vel Gabiis, vel cum rigidis æquata Sabinis,
Pontificum libros, annosa volumina vatum,
Dictitet Albano Musas, in monte locutas."

lieving that these better and other men would fear to tread anywhere, and if a vigorous arm were not put forth to scatter their doubts and their dreads, and even their resisting powers, there would be little, if any, Reform in our realm of England. The expressions, "abortive patchwork," and "gaudy botch," as applied to our modern jurisprudence, appear very much like calling of names. But the plain sense which we would deliver to the articled clerks who read this really useful volume (and we hope many will do so) is, that of the numerous statutes handed to us for our observance during these twenty years, scarcely one has been withdrawn from the Code of permanent legislation.

The Act of 1844, "To Simplify the Transfer of Property," certainly yielded in the next year to the 8 and 9 Vict. c. 106.,¹ but the history of our last legal decade reveals the steady and progressive march of all the principles which have been nurtured in the reigns of William the Fourth and our present gracious Sovereign. And it will be difficult to point out instances where these changes have failed to command strong majorities in Parliament, and the crowning satisfaction of public approval. On the other hand, so cautious of innovation are the lawyers of this day, that we find from the records of the Session now instant, how easy it seems to produce bills for alterations in our jurisprudence, and how numerous are those essays, yet how rarely they have ripened into acts, and how often the young fruit is caught by the blighting frosts of some select committee, or dropped order, or Black Wednesday which has consigned so many labours to the tomb.

The motto of the men of Merton was a just one for that age, "*Nolumus leges Angliæ mutari;*" but our rings bear this motto, "*Legibus emendes.*" After all, Mr. Wharton can well bear, that if we do not use correction, we can at all events abstain from subscribing to all his sentiments; for he is not without confidence in the value of his writings.

"A dictionary," he says, "is very essential, and I do not hesitate to recommend my own Law-Lexicon, a second edition of which

¹ P. 469.

² An Act to amend the law of Real Property.

is being prepared. It explains all the technical words and phrases employed in the several departments of English law, and includes the various legal terms used in commercial transactions, together with an explanatory, as well as literal translation of the Latin maxims contained in the writings of the ancient and modern commentators.”¹

So again²:

“In my exposition of the laws relating to the Women of England, just published, will be found every doctrine and procedure in anywise affecting the fair sex, whether as infant, wife, or widow. It is recommended to the student as a comprehensive treatise on a constantly recurring and interesting subject.”

We have already spoken favourably of the work, and the writer is evidently not indisposed to utter his own “gratulator” on a subject so intimately connected with his own exertions.

We have, in common with the majority of reflecting men, a sincere interest in a better arrangement of the Statute Book, although it may be with views not quite identical with those of the Manual, but which nevertheless espouse the same cause. And we certainly are entirely agreed as to the mighty verbiage of law reporting. The Society for the Amendment of the Law has done much to investigate and discourage the pruriency of these periodical visitations. We will give at large Mr. Wharton’s opinion upon this head. It is a good specimen of the florid style with which he relieves the monotony of mere law:—

“While the rapidity with which Acts of Parliament increase and swell the Statute Book is great, the despatch with which reports augment, and pile up tome upon tome is greater. Happy the man with a memory that can retain even a tithe of the restless changes; lucky he who possesses the patience to wade through the chaotic heap to learn the new gloss, and to unlearn the superseded comment. Hitherto, indeed, the comparisons of celerity have been the disengaged rock from the mountain peak, the rushing wave, the lightning’s blaze, the thought-flash, or the less poetical allusions to an express train or the electric wire; but they must all—yield to the more truthful and striking simile of fast things, conveyed by the hey! presto! publication of Law Reports!”

¹ Pp. 23, 24.

² P. 136 (note 9.)

The commentary, however, upon this text may not be so easy of acceptance. "No report ought to be accepted as an authority, unless it has had the sanction of the Court that decided it."¹ Truly we should then be alarmed for the opposite dilemma. The visits of these really useful expositions of the judicial mind might be, indeed, far between. On the other hand, the Law Journal is a very meritorious periodical, and not the less so because it partakes somewhat of the hey! presto! but we certainly do not assume to be geniuses competent, whether in mind or purse, to grapple with whole libraries of the same thing. We wish we were Governor of the Isle of Barataria for six months, for we think we could effect, during that season, a wonderful relief to the profession by due expurgations of these rival chronicles.

The crowded title-page will have already explained the summary of the volume. Its author is fond of analyses. There are two opinions as to the benefit of analytical distinction. If pressed too far into service, it doubtless dwindles into weakness. But a rational division of materials cannot fail of usefulness, and has, in fact, been the law of all ages.

The first portion of the work embraces a wide range of the law. The practice of the Courts, together with the Common and Statute Law,—Conveyancing—Equity and Chancery Practice—Bankruptcy—and the Criminal Law. Some pains have evidently been taken in preparing these chapters; and the more modern changes have not escaped attention. The Court of Common Pleas, it may be remarked, is still open to an access of labour. Under the Railway and Canal Regulation Bill of this session, that Court is intrusted with the decision of all legal intricacies connected with the right working of the measures. We suppose we should class this new jurisdiction under Mr. Wharton's *Auxiliary*, or, it may be, *Appellate* Section. We must pause for a moment upon one of the pages devoted to conveyancing, because we think that the contents are calculated, no doubt unintentionally, to mislead the reader.

Speaking "(2)" of the "Prevalence of Uses," which lasted

until A.D. 1535, our author observes, "We owe the clever scheme of separating the *benefit* from the *possession* of land to the monks, which is not the only obligation conferred upon us by their ability and profound learning."¹ "The scheme consisted in its duality,—the separation of the profit or benefit from the possession." However, being aware that the tribute to monkhood might not meet with unqualified assent, he adds, "It is commonly asserted that uses originated in fraud, while their continuance was marked with honesty. But, be this as it may, this anti-feudal novelty was the means whereby the public ceremonies, exactions, and grievances of feudality were eluded and rendered powerless."² Undoubtedly, whether the doctrine of Uses was conceived in the reign of Edw. III. of Richard II., or at any earlier period, this emancipation of the inheritance from the perpetual servitude of possession was of lasting and beneficial consequence. It is now no matter that the common lawyers stumbled upon the crotchet that a use could not be limited upon a use, and that the lynx-eyed acuteness of the Court of Chancery created the superstructure of trusts upon the wreck of the ancient uses. Neither do we desire to gainsay the learning of some of the old churchmen, chancellors, and abbots, but we imagine that this coinage of the use bore a date prior to that which has been assigned it. If the ecclesiastics adopted it in the time of Edward III. or thereabouts, it was probably to create the statutes of Mortmain. So that if a conveyance of lands were made to some lay person, he would hold it nominally indeed, but with a secret agreement that the ecclesiastics should have the use, and be permitted to take the rents and profits. In another page Mr. Wharton dwells upon this duality by importing it into a kind of escutcheon with two hands, one of which points to the "legal possession in feoffee to uses," the other to the "equitable or beneficial interest in *cestui que use*." We certainly should have preferred that our obligations to the monks should have been qualified by a notice of the ecclesiastical interests which are said to have swayed their conduct; but, independently of this remark, the portion dedi-

¹ P. 119.² Ibid.

cated to conveyancing reads learnedly and copiously. Nor can the writer be accused of idleness, since he announces that he is preparing a selection of annotated precedents, with dissertations on the principles and practice of conveyancing.¹

"The Court of Chancery," he continues, "originated, in all probability, from the Crown's prerogative of mercy, and was established as a Court of Grace of the Sovereign, in order to afford relief in those cases in which the Common Law was inadequate for the purposes of complete justice. The proceedings of this Court, in which the Chancellor sits as a Prætor" (a great fondness for the Roman law is discernible), "closely resembles those of the Middle Ages."²

We give some passages relating to fraud in Equity:—

"The ingenuity of mankind is ever anxious, ever striving to entangle in its meshes the unwary and the inexperienced; and were Courts of Equity to prescribe the limits of their relief against fraud, or to define strictly the species of evidence receivable in proof of it, their decrees would be ineffectual, and continually eluded by man's ever active tact. To afford therefore as complete protection as possible from the lamentable turpitude of humanity, new principles must be invented to meet new species of fraud. It is only *civil* and not *criminal* fraud which is relievable in Equity; and fraud in obtaining wills is not within the jurisdiction of Equity; for, as to wills of realty, the Common Law Courts must be resorted to, and, as to wills of personalty, the Ecclesiastical Courts. There is no limitation against the discovery of fraud. 'No length of time,' emphatically observed Lord Erskine, 'can prevent the unkennelling of fraud!' And Lord Northington said, 'The question is, whether delay will purge a fraud? Never, while I sit here. Every delay arising from it adds to its injustice, and multiplies the oppression!' Proceedings, however, to redress fraud, must be instituted within six years of its discovery."³

It seems that as the *animus testandi* is wanting, the instrument cannot be considered in the light of a will, and, therefore, the issue, *devisavit vel non*, is directed, and as this is matter of fact, it does not come within the provisions of the

¹ To be published without delay, p. 137 (n. 10.)

² P. 170.

³ P. 181.

Act for improving the Jurisdiction of Equity.¹ Formerly, the fraudulent person was held to be a trustee for the party prejudiced by the dishonest proceeding.

After examining the jurisdiction, the principles, and the best authorities upon the doctrines of Equity, the chapter winds up with a sketch of Chancery Procedure. Perhaps to the Catalogue of Bills, which ask the aid of the Court against possible further injury², &c., a bill of peace to prevent a multiplicity of suits where the matter has been already investigated in full by a Court of Law, may be added.

The division appropriated to bankruptcy begins ominously with a quotation from "The Merchant of Venice":—

"There came divers of Antonio's creditors in my company to Venice that swear he cannot choose but break."³

Certainly it is a correct observation that the Common Law did not provide sufficient safeguards for commerce, nor did it respect the credit of trade with sagacity. For the severities with which the debtor was overwhelmed presented no distinctions, and permitted no revival, so that the "inexorable creditor" and "unfortunate trader" were placed in an opposition ruinous to both.

The author's opinion leads to an impression that we have now gone rather too far in the contrary direction:—

"It may be a subject of complaint that the laws are somewhat lax as to the reckless and dishonest trader, permitting him to escape his creditors too easily, and with too much impunity."⁴

This is not altogether a wrong conclusion, although it may not be a very popular sentiment. Dishonest principles are very rife in society. They are the offspring of luxury, in-

¹ 15 & 16 Vict. c. 86. s. 61.

² P. 195.

³ "The Merchant of Venice" is referred to at the beginning amongst "Books cited, criticised, and recommended." This put us in mind of an index in which the words "great mind" was supposed to have been inserted. . . . Upon reference *in loco*, it was found that the judge being dissatisfied with a witness, had a *great mind* to commit him. But speaking of Indexes, how is it that Mr. Wharton has none at the end of his work? He abounds in analyses, and has conferred upon us an appendix, but that useful piece of drudgery, the index, has not been thought necessary.

⁴ P. 235.

dependence, and ease. They have insinuated their baneful poison into the dwellings of all classes. Their tendency is to lay the foundation for future trouble, because the man who exceeds his income, or shrinks from the payment of his debts, bids fair to become, in some form or another, a burden upon the industry of his neighbours. But we proceed. Encouragement is given to an aspirant in the matter of bankruptcy authorship:—

“There has not been any comprehensive work upon Bankruptcy since these Acts (*i.e.* the modern Statutes) have been law. Flather’s edition of ‘Archbold on Bankruptcy’ was the best. It was published in 1844, and may be read, if the student take care to remark the recent alterations made in this branch of practice. A Commission is now sitting upon the Bankrupt Laws, and their report to Parliament will doubtless be the signal for future changes.”¹

The department of the “Criminal Law” is well and faithfully introduced:—

“This branch of practice is not held in very high repute amongst the attorneys and solicitors, who do not consider it respectable. But that it is a most important department of our laws no person can doubt; and to be ignorant of its principles would incur the reproach of living in society without knowing the obligations imposed by its legislative enactments.”²

We can vouch for the authenticity of this stricture. But we suspect that the insufficiency of reward goes hand in hand with the disrepute of the employment. It cannot, nevertheless, escape observation that the lives of men and women have been frequently sacrificed for want of an able solicitor and experienced counsel. The accused, not the less innocent because he happens to be charged with a crime of magnitude, invokes the help of his friends. They hasten to a practitioner. He may be a person of eminence, but, in general, he moves in an inferior circle of the profession. Perhaps if the adviser lives at a distance he sends down a clerk to defend the prisoner; at all events, unless the trial be at the Central Criminal Court, there is no guarantee that the case will not

¹ P. 250.

² P. 269.

be confided to an advocate, honourable and well disposed beyond question, but unequal to the grave task. We have known narrow escapes under such circumstances.

Mr. Wharton carries on his lists and analyses. Under the head of Homicide he has Manslaughter—(a) Voluntary; (b) Non-voluntary.¹

Non-voluntary, being interpreted, might mean, not accidents *per infortunium*, which occur in the prosecution of an act in itself lawful, but illegal omissions or neglects. As if one should leave a glass with poison in a room where a child is a frequent visitor; or where, out of ignorant kindness, a liquor or other ingredient is administered to a person of tender years or sick in such a quantity as to be manifestly pernicious; where a man carelessly, not recklessly (for then he would hazard a charge of murder), tosses a stone or heavy material into the street, or rolls it down a steep place, whereby a passenger is killed.

We rather wish that the Manual had contained some more distinct allusions to the Common Law. There are very few substantive immoralities which are not the subjects of punishment by the *lex non scripta*, and we think that the public attention has not been sufficiently invited to this fact in modern days. It might not be easy to attempt too subtle a diversity between the Common and Statute Law, but we would have been glad to see some recognition of the former when it could have been conveniently noticed.

We do not think that some offences have been sufficiently distinguished. As, for instance, the new charge of misdemeanour for maliciously wounding², although it is certainly included in No. 3. of Mr. Wharton's Catalogue of Offences against the Person. So the misdemeanour of being found by night armed, or of the illegal possession of any implement of house-breaking³, does not appear amongst the offences affecting property. So amongst the misdemeanours against public economy we do not find the statute of 10 Geo. IV. c. 7. in contravention of unlicensed Jesuits, nor that of 25 H. VIII. forbidding unlicensed canons. And we do not perceive them in

¹ P. 274.² 14 & 15 Vict. c. 19. s. 4.³ Ibid. s. 1.

the section containing "Offences against Religion." Nor do we observe the offence of buying and selling of offices, although that may possibly be embraced under the head of "Bribery." The registry of births, marriages, and deaths is regarded with jealousy by the Legislature, as the statutes of Wm. IV. have testified, and, without being too diffuse upon this head, there are likewise convictions for disturbing religious congregations, for offences against the Anatomy Act, the Poor Law Act, the Tithe Commutation Act, the Newspaper Stamp Act, and numerous others which deserve the attention of the student. Even the old statute for the preservation of woods, 35 Hen. VIII. c. 17., seems to be in force, and there are violations of the railroad Acts which amount to misdemeanours.¹ Nevertheless, so large is the catalogue of those Acts which denote the imperfections of mankind, and the necessity of imposing checks upon human ingenuity, that we must not expect an universal roll of all the *mala prohibita* which it is the duty of good citizens to notice and avoid. The work before us bears the sign of no inconsiderable impress of labour.

The remaining divisions of the book comprise the constitutional law, the Roman civil law (of which the author seems not a little enamoured), laws ecclesiastical, maritime, and military, the colonial law — the international law with the conflict of foreign and domestic jurisprudence. Medical jurisprudence, followed by an appendix, having for its motto, "*Hoc agite, O Juvenes*," containing "the rules and regulations governing the services, examination, and admission of articled clerks, with precedents of all the necessary forms, and the stamps and fees," concludes the book.

We have not space to enter into the interesting inquiries which may sometimes be attached to the class, *bona vacantia* mentioned in the constitutional division², but we will pass on. If the articled clerk can master any treatise concerning wages, rent, and profits, whether of Malthus, Adam Smith, Mill, M. Say, or others, we shall recommend him to keep a sharp look out after his practice and precedents, and future clients. Speaking of the Ecclesiastical Courts our author

¹ See amongst others 3 & 4 Vict. c. 97. s. 14.

² P. 329.

praises the judgments of Sir Christopher Arkwright as "models of judicial intelligence, impartiality, and eloquence." We think we may just call to mind the splendid effusions of Sir William Scott (Lord Stowell), whose dignified demeanour and elegant conversation harmonised elegantly with his forensic talents.

The few pages on Colonial Law, though short, are by no means unworthy of attention. The same may be said of the residue of the work, for although the conflict of laws and medical jurisprudence are embraced in a mere summary, it must be remembered, that a manual of this nature would be an unwelcome guest instead of a companion if its contents were too widely distributed, and the compass of its learning spread over too large a circle.

We have as yet omitted all mention of that which, in our minds, yields in usefulness to no other portion of the undertaking — we mean, the Examination Questions. They seem well chosen and arranged, and although, of course, not entirely original, they form, at convenient intervals of the book a selection of value. These, more than many exercises, will tend to enlarge the student's intellect, and ripen it for further achievements. To frame suitable answers, in season and out of season, to inquiries such as these, is to lay the foundation of the storehouse of knowledge, especially if some treatise connected with the matter to which they relate be first read. And it is obvious that the employment of the same tutor by a class of young men would give a promise of greater efficiency than isolated instruction. Of tasks like these we may say with the great orator of antiquity: "*Hæc studia adolescentiam alunt, senectutem oblectant, secundas res ornant, adversis perfugium et solatium præbent; delectant domi, non impediunt foris; pernoctant nobiscum, peregrinantur, rusticantur.*"

Examinations are the fruits of these questions. We do not intend to assume that the merits of such a discipline and of private industry in preparing answers are entirely identical and equal. Because the mode of ascertaining a pupil's proficiency is now capable, in all professions, of becoming the vehicle of caprice, whereas a steady response at home to

numerous propositions, gradually collected by diligent predecessors in the art, can never fail to draw after it a full and painless recompense. But, inasmuch as many students will never work unless they are subjected to an ordeal of this nature, it is a necessary introduction to the practice of their profession: it stimulates some to emulation, arouses the sleeping powers of others, stands *in terrorem* over the lazy propensities of the idle, and becomes, in a great measure a public guarantee that the interests of the client shall not be endangered for want of elementary instruction. We merely protest against the abuse of a weapon at once formidable and beneficial. A soldier may be brave in battle, courteous in civil life, and well acquainted with strategy and warfare, without being tied to answer the date of the battle of Lepanto, or describe the marches of the heroes of antiquity, or relate the issue of a contest in some distant age, of which no one has the slightest recollection except the querist. This is likewise the case occasionally, but with more excuse, in classical examinations, although we have heard of instances where the student has been a match for the professor. As during some such trial of skill in Ireland, when the birth or death of Alexander the Great, we forget which, was guessed at by the alarmed scholar, but unexpectedly ratified by his superior, who fixed the date, different by a century or two, from that assigned to it by our historians. The series of questions propounded in this volume are carried through the Common Law, Conveyancing, Equity, Bankruptcy, and the Criminal Law. The first question in Conveyancing, which is not badly put, and which the author is pleased to call "preclusive," is a fair specimen. "What was the origin of conveyancing; what was the usual method of transferring property, and which of such methods has been rendered unnecessary by Act of Parliament?" This is a proper question, easily answered, but still one which requires a certain amount of diligence to give the right reply.

So in the Common Law, the early questions on *Habeas Corpus* and the personal liberty of the subject read well.

"1. State a few of the Acts of Parliament securing the
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personal liberty of the subject, and in whose reigns they were passed.

"2. What is the personal security acquired by the *Habeas Corpus* Act, and what is the mode of obtaining the writ?"

These questions had liked to have been spoiled by the prefix of the hard word "Incarceration" which has been placed at the head of them.

In Equity (No. 19) —

"State shortly the provisions of the recent acts for the relief of trustees, and of the order of court, by which the practice is regulated."

The question—"Describe the offence of embezzlement, and state what must be proved in an indictment for that offence"—is mentioned by Mr. Wharton as having been a theme of *eleven* examinations. We are not surprised at this, as the judges seem to be increasingly embarrassed by the subtle distinctions between embezzlement and larceny, — a dilemma which the late statutes have been powerless in removing or even mitigating.

The following question is significant, and has been asked *ten* times.

"Is it an offence to compound a felony, a misdemeanour, or a criminal information, or any and which of them, and what are the punishments."

We take leave of this book with the token of our approbation, that we have read it, and appreciated it as a valuable help. The writer must not count upon transferring his poetic vein to every articled clerk, who will be more likely to be seduced by the lawyer's letters so elegantly suggested as "a rule of courtesy" in the first chapter of the work. But if one fifth of his questions are answered and understood, and his book be well digested, we think he may have no reason to regret, to use his own peroration, his "self-imposed but agreeable labour."

**ART. VI.—"WHERE SHALL THE NEW LAW COURTS
BE BUILT?"**

1. *Lincoln's Inn Fields Inclosure Act, 8 Geo. II.*
2. *Two Reports from Select Committees of the House of Commons on Courts of Law and Equity, 1842—1845.*
3. *Where shall the New Law Courts be built?* By an OLD LAW REFORMER. Day, Carey Street: 1854.

UNTIL the cities of England abandoned their fortifications, which was not till after the "Great Rebellion," there was an obvious motive why they should be closely built, and such is the love of imitation, that even towns unencompassed by walls adopted the fashion of the cities, although without the same motive for confinement. Thus old towns may be found consisting only of a single narrow street in which the houses are huddled together, though fortunately for the inhabitants the evils thus produced are mitigated by the open gardens and fields at the back of each dwelling. There was, however, an interval of time between the era of fortified cities and that which began many years ago, when the motive to build upon every inch of unoccupied ground was created in our large and increasing towns by the enormous rise in the value of the land which forms their sites. Unfortunately this interval was not sufficiently long to establish a permanent demand for open places, if indeed any such demand in the state of ignorance which then existed respecting the conditions of salubrity could have been maintained against the cupidity of land-owners, and the requirements of manufactures and commerce.

As might be expected, the Metropolis took the lead in yielding to the temptations to which we have adverted. The fields and gardens so familiar to the readers of our early memoirs, have one by one been blotted out, and would be forgotten if streets and alleys did not retain the old names which their sites forfeited, when the unwholesome buildings came into existence which now usurp their designations.

Squares are beginning to follow the same fate. Leicester Square has a large building in the centre of it, and persons of zeal and influence are unwearied in their attacks on Lincoln's Inn Fields, their object being to bring the Law Courts from Westminster and also from the City, for the purpose of uniting them in a vast edifice to stand in the present garden of the noble square. We deprecate the encroachment. It is high time to make a stand against the progress already made in thus destroying the reservoirs of air in the central parts of London, and it is impossible to find a more fitting opportunity than the one which now offers itself for our consideration. To bring Lincoln's Inn Fields to what it now is was not the work of a day, nor was the improvement taken in hand until its want had been sorely felt. The poet Gay has left us in his *Trivia*, published in the year 1720, a vivid picture of the state of Lincoln's Inn Fields in his time.

"Where Lincoln's Inn's wide space is rail'd around,
Cross not with vent'rous step; there oft is found
The lurking thief, who while the day-light shone
Made the walls echo with his begging tone:
That crutch which late compassion mov'd shall wound
Thy bleeding head, and fell thee to the ground.
Though thou art tempted by the link-man's call,
Yet trust him not along the lonely wall;
In the midway he'll quench the flaming brand,
And share the booty with the pilf'ring band.
Still keep the public streets, where oily rays
Shot from the crystal lamp, o'erspread the ways."

The description of the poet was verified by high authority. In 1734 an Act passed "to enable the present and future Proprietors and Inhabitants of the Houses in Lincoln's Inn Fields, in the County of Middlesex, to make a Rate on themselves for raising Money sufficient to enclose, clean, and adorn the said Fields." Its preamble recites that "whereas the said great square, now called Lincoln's Inn Fields, situate in the several parishes of Saint Giles in the Fields, Saint Clement Danes, and Saint Andrew, Holbourn, in the county of Middlesex, hath for some years past lain waste and in great disorder, whereby the same has become a receptacle for rubbish, dirt, and nastiness of all sorts, brought thither

and laid not only by the inhabitants of the said fields, but many others, which has not been removed or taken away by the several scavengers of the parishes wherein the said fields are situate as aforesaid; but also for want of proper fences to enclose the same, great mischiefs have happened to many of his Majesty's subjects going about their lawful occasions, several of whom have been killed, and others maimed and hurt, by horses which have been from time to time aired and rode in the said fields; and by reason of the said fields being kept open many wicked and disorderly persons have frequented and met together therein, using unlawful sports and games, and drawing in and enticing young persons into gaming, idleness, and other vicious courses; and vagabonds, common beggars, and other disorderly persons resort therein, where many robberies, assaults, outrages, and enormities have been and continually are committed, notwithstanding the watch or guard allowed by the several parishes wherein the said fields are situate for preventing the same: And whereas the south, west, and north parts of the said fields are encompassed with houses, many of which are inhabited by the owners and proprietors thereof, who with the other inhabitants cannot go to and from their respective habitations in the night season without danger, and therefore are desirous to prevent any mischiefs for the future, and to enclose, clean, repair, and beautify the said fields in a graceful manner, and are willing and desirous that an adequate contribution may for that purpose be raised by and amongst themselves."

The happy change produced by the exercise of the powers of this Act is within the knowledge of our readers, and nothing requires to be said on that subject.

In the year 1841, several gentlemen of high respectability acting on the maxim that

"Self-love and social are the same,"

and rightly judging that public convenience urgently required the union of the various Courts of Law and Equity in the Metropolis at one central point in the law quarter of the town, and being also accidentally owners and possessors of

houses in the square well adapted for Chambers (many of which were already applied to that use) formed the project to which we have referred. They had sufficient influence to obtain the appointment of a Committee by the House of Commons to consider their plan and to take evidence as to its eligibility; and many witnesses were examined in that and the subsequent year. The preliminary question as to the propriety of changing the present positions of the Courts, and collecting them together, disclosed some conflict of views and desires, but not so much as might reasonably have been expected. On the whole, that portion of the proposed change may be considered to have been established so far as preponderance of opinion in those whose pursuits enable them to arrive at a just conclusion on the matter is to be taken as proof. The principal dissentients have now passed away, and probably their places have not been supplied. The opinion, then, in favour of congregating the Courts in the law district may now be said to be all but universal.

We shall, therefore, confine our own attention, and that of our readers, to the question asked by the "Old Law Reformer,"—"Where shall the new Law Courts be built?" although we are not prepared to answer it as he does,—“In Lincoln's Inn Fields.”

In his examination before the Committee of 1841-2, Mr. M. D. Hill, while he cordially approved of bringing the Courts into the Law District, strongly objected to the site fixed on by the promoters, and recommended another:—

“The proposal,” he says, “which was kindly sent to me was to build Courts in the centre of Lincoln's Inn Fields; I decidedly object to that precise spot, upon several grounds; principally that I think there are so few large openings in the centre of the Metropolis, that we ought not to interfere with any one of them; moreover, I think that the building of the Courts might be a means of improving a portion of the Metropolis, and there are many parts near Lincoln's Inn Fields which require improvement. It has struck me that if the ground on which the block of houses extending between Bell Yard and Clement's Inn now stands were to be chosen for the site, much building which ought to be removed would be got rid of, and that a spot so selected for the Courts

would give advantages of access more equitably distributed between Lincoln's Inn and the Temples than would be done by fixing on the centre of Lincoln's Inn Fields; and I think, all things considered, that the spot which I have pointed out would be more completely in the centre of the law quarter. I think that very good access might be made to such Courts from the Strand, and from streets which would be made, and which must be made, I apprehend, even without reference to this improvement, before very long, to relieve the Strand and the line of streets of which it is a part, from the present over-thronging of population and vehicles; and I think that might be done without opening Lincoln's Inn Fields to carriages more than is done at present. It appears to me that it would be an evil to make Lincoln's Inn Fields a great thoroughfare, for at present it is a place for relaxation and amusement, and for taking air, by a very large population, and I think their comfort would be very much interfered with by making Lincoln's Inn Fields a thoroughfare; and it is also my opinion that that must be done if the Courts are in the centre of Lincoln's Inn Fields; I, therefore, have formed rather a decided opinion against the propriety of the exact site fixed upon by the promoters of the change of the Courts from Westminster and Guildhall to the law quarter of the town."

Sir Charles Barry, who had prepared the architectural plans for the promoters, was called upon to compare the two sites, and having done so he gave his opinion in favour of that in Lincoln's Inn Fields. At the close of the Session of 1842, the Committee having reported the evidence without pronouncing any opinion upon it, the project seemed to have fallen into abeyance until the Session of 1845, when the Committee was revived. During the interval the attention of the Law Institution in Chancery Lane had been drawn to the project. This important body appears to have adopted the views of Mr. Hill, as they petitioned Parliament in favour of the site which he suggested; Sir Charles Barry, too, having had an opportunity of re-considering the question, and having obtained much information regarding the site which he had formerly rejected, spoke of it in high terms, as well fitted for his purpose. He says, "I should propose, as the best site for the new Courts of Law, that is the most central as well as the most convenient site for all the Inns of Court and

chambers,—a site that might be obtained by the clearance of a very low neighbourhood between the Strand and Carey Street."

"62. *Sir R. H. Inglis.* To the north of St. Clement's Church, going northward from Pickett Street to Carey Street?—Yes. I might be permitted to state that the clearance of such a neighbourhood as that which I have described would of itself, irrespective of the future appropriation of the site, be one of the greatest public improvements that I know of in London.

"63. *Chairman.*¹ When you say 'One of the greatest public improvements,' you mean with reference to the health and beauty of the Metropolis?—Yes, as well as the morality of the Metropolis.

"64. Have you any plan of the site which you propose to occupy for that purpose?—Yes, I beg to put in a plan marked (B). On this plan is shown, by a tint of yellow, the site proposed for the Law Courts. By certain other portions of the plan, tinted red, is shown proposed new buildings for chambers, surrounding the proposed Law Courts. I propose that a much larger site should be obtained than is absolutely required for the new Law Courts, in order that there might be a very considerable return in the shape of ground rents for chambers in diminution of the expense of purchasing the site in question. I have gone over the whole of the property which I consider it would be advisable to purchase with a gentleman whose local knowledge of the property is unquestionable (Mr. Cadogan, who has his office in Pickett Place), and I have every reason to believe that the estimate which that gentleman has formed, and which I have had an opportunity of checking, by going over the same ground, may be relied upon. The amount that would be required to purchase the whole site considered necessary to carry into effect the alterations shown in plan (B), would amount to 675,074*l.*

"65. Will you give the boundaries of the area comprehended in that estimate?—It will be bounded on the north by Carey Street, on the east by Chancery Lane, on the south by the Strand and Fleet Street, and on the west by Clement's Lane and Plough Court.

"66. *Earl of Lincoln.* What is the area of that space which you have described?—The length will be, from east to west about 700 feet; and from north to south about 480 feet.

¹ Mr. Charles Buller.

"67. Can you state how many acres are comprehended in it? — About $7\frac{1}{2}$ acres.

"68. *Chairman.* How would you propose to fill this area? — I should propose to place the Law Courts in the centre of the site, or nearly so, and the proposed chambers east and west of it.

"69. You have formed a plan of the proposed building? — I have, but not in detail.

"70. And you have coloured in the map the portion of the space which your proposed building would occupy? — I have.

"71. Is there any residue out of the space which you propose to take, and which you have estimated in the calculation of 675,074*l.*? — A very considerable residue, which I should propose to appropriate to the purpose of building chambers, as shown upon plan (B), which exhibits two quadrangles on each side of the Law Courts, and a row of houses towards Plough Court. The value of the ground-rents that might be obtained for the proposed chambers alone is, in my opinion, worth the sum of 316,500*l.*

"72. *Earl of Lincoln.* Leaving the expenses of the actual site for the Law Courts how much? — 358,574*l.*

* * * * *

"76. *Chairman.* In your proposed plan for the Courts of Law have you included Judges' chambers? — Yes. I propose that the Judges should be accommodated in the new building. I have not gone so much into detail with the plan of the new building as to say with certainty that such would be the case; but I imagine from the immense size of it, and the number of stories that would be available for offices, that all the offices and other accommodation which I have mentioned might be obtained.

"77. Then according to this estimate of yours, deducting these set-offs from the expense of purchasing the ground, you would make out that in fact the purchase of the ground would not cost above 172,224*l.*? — Yes; not more than 172,224*l.*, exclusive of the value of the offices attached to the Courts of Law.

"78. If you were to make no deduction for the value of the present site it would be 258,224*l.*? — Yes, it would.

"79. And this includes the formation of new streets immediately contiguous to the site? — Yes, it does.

"80. And the clearing away of a very unwholesome, unsightly, and disreputable neighbourhood? — Yes.

"81. Have you got any plan of the proposed building? — The plan would be very much like that which I proposed some years ago for a building to occupy the centre of Lincoln's Inn Fields; it

would be upon the same principle; the accommodation would be for twelve or fourteen Courts, each with a judge's room, a clerk's room, and anteroom, barristers' room and solicitors' room; and in the Common Law Courts, in addition to this accommodation, a room for the jury. It would include also a room for the grand jury, a law library, consultation rooms, a refreshment room, a great central hall, communicating with the whole of the Courts and their appurtenances, for the accommodation of the public, and private lobbies and communications for the convenience of the Judges and the Bar. The Courts would be arranged around the great central hall, and towards the exterior of the building, surrounding the Courts, would be arranged all the private accommodation connected with the Courts respectively.

“82. *Sir R. H. Inglis.* What would be the extreme elevation of the plan which you now lay before the Committee, and which appears to be nearly the same as that which you laid before the Committee in the year 1841-42?—The elevations would be much higher than in the plan proposed for Lincoln's Inn Fields, which was formed on the consideration that it would be desirable to keep the building in that situation as low as possible, in order to obstruct as little as possible the air and ventilation of that neighbourhood, and, with that view, the building was designed in a style of architecture which admits of low proportions. The style of architecture that I should propose for the new building would be altogether different from that proposed in the first design. I should say that it would be desirable that it should be in the mediæval style of architecture, and that the loftier the building is made, provided no practical inconvenience results from the height, the better will be the external effect.

“83. *Chairman.* How many stories would you propose to have in this building?—In the exterior of the building I should propose four stories; the centre of the building would be lower, and the great hall and surrounding courts would be lighted entirely from above.”

The Committee of 1845, like their predecessors, contented themselves with reporting the evidence without pronouncing an opinion on the project. Nine years have since passed away, and nothing has yet been done. But attempts are now making to return to the site in Lincoln's Inn Fields. A large majority of the houseowners in the Square are, as they always have been, in favour of that site. The reasons are

obvious. Lincoln's Inn Fields has nearly ceased to be a place of residence, and the proximity of the Courts would enhance the value of the houses as chambers, though we should suppose the difference between the Strand site, and that in the centre of the Square would be too slight very much to affect the pecuniary value of the property in Lincoln's Inn Fields, whichever of these sites might be adopted. The alarm felt by the proprietors of Lincoln's Inn Fields, we apprehend, arises from that part of Sir Charles Barry's proposal, which regards building chambers in immediate proximity with the new Courts. A portion of the scheme by no means essential, and in the present redundancy of chambers, perhaps, not expedient, as not promising an adequate remuneration in the way of rent for the outlay.

But although private individuals, who will naturally look somewhat keenly to the pecuniary features of the question, are in favour of the promoters' choice, yet the public bodies of the vicinity appear to hold a different opinion. The College of Surgeons has altogether refused its consent, and the Society of Lincoln's Inn, whose interest in the "benefit and advantage of the prospect and air of the said field" is recognised in the Act, has certainly withheld it, and, if we are correctly informed, their ultimate decision is very likely to be in unison with that of the College of Surgeons.

But whatever may be the course pursued by private and local interests, we must consider the question upon much broader grounds, and look entirely to the public benefits to be derived from the selection of the one site in preference to the other.

The cause of the *Lincoln's-Innists* is urged with great zeal by the "Old Law Reformer," who begins by laying down a principle in which we heartily concur, "*that the Courts should be built on that site which, by its convenience and suitableness, will most favour the administration of justice.*" To satisfy this principle he truly says, "*that the Courts will demand ample space, quietude, air, light, and convenient access for foot passengers and carriages.*"

With regard to space, we have the authority of Sir Charles Barry for believing that the space which can be obtained

on the Strand site will be more than is required. As to quietude, the Old Reformer seems a little too nervous. He forgets that the present Courts at Westminster are upon a line which frequently "rolls its tide of carriages" with great force and swiftness, and yet we never heard, among the variety of complaints which the Judges and the Bar have at various times urged against these Courts, that disturbance by noise from without forms an item in the list. The question being put to Mr. Hill, "Have you considered whether it would not be very difficult to keep the Courts quiet, in the choice of such a site as you now suggest?" His answer is, "I do not anticipate any practical difficulty in keeping the Courts quiet; the modern plan is to have no opening in the walls, but to light the Court from the ceiling, and I myself have never been able to hear any sound that appeared to me to proceed through those lights from above." This mode of building would appear to be that contemplated by Sir Charles Barry. With regard to the adjacent offices, if our fastidious friend should occupy one of them, we should recommend him to adopt the obvious expedient of double windows or single windows of plate glass, either of which will keep his nerves harmless. Air and light in all needful quantities may be insured by the engagement of an architect who shall be competent to his duties, which duties, we may observe, *par parenthese*, go somewhat beyond the capacity for making pretty drawings, or even for constructing ornamental exteriors. If the air of the Court is as good as is breathed in the metropolis generally it is all that can be hoped for. We must not attempt any rivalry with the breezes on the Downs of Brighton.

Convenient access for foot passengers and carriages, we think, is best provided by the Strand site. We are told by the "Old Reformer," that "the Woods and Forests, in consequence of the enormous increase of carriage traffic, have projected, and are now taking steps to form, a new and wide thoroughfare from Cheapside to Longacre, to relieve the Strand and Holborn." The Courts may therefore be reached by the cab and the omnibus, which will set down their passengers on either side North or South. While the

proximity of the Strand site to the Temples would hold the balance more fairly between the lawyers of the three great Inns of Court than would be done by placing the edifice in Lincoln's Inn Fields.

The reader will be amused by the manner in which our lugubrious Ancient disposes of these obvious advantages. In addition to the thoroughfares running North and South, he favours us with one to be made by widening Great Turnstile and Serle Street,—a proposal on which the society of Lincoln's Inn would have a word or two to say, and which can only be carried into effect by abandoning the seclusion of Lincoln's Inn Fields, which it was one of the objects of the Act of Geo. II. to secure, and one to which our Iconoclast himself is not quite indifferent. Moreover, if, as he contemplates, this thoroughfare is to run from Great Turnstile into the Strand, *cadit questio*; the site which we advocate will then be cut into two parts, and entirely destroyed for its projected purpose:—

"On three sides, therefore," he continues, "three of the most thronged thoroughfares of London will beset the Courts with never-ending noise; on three sides no window can be opened in business hours on account of the din of carriages; and on three sides the dust of ever-moving thoroughfares will pierce every cranny, and prove a constant annoyance. From three sides too, foot passengers will only gain the Courts by struggling through the moving vehicles of crowded streets. Barristers in wig and gown, solicitors and their clerks, coming from Lincoln's Inn and Gray's Inn, must fight their way across a thoroughfare 80 feet wide; and from the Temple must cross the Strand made 100 feet wide; and from Clement's Inn and the west side a street as thronged 60 feet wide, and must perform the same feat, to and fro, many times a day, to the no little risk of life and limb. Looking to the numbers that will daily attend this great aggregate of courts and offices, we may expect that one or two hundred persons will be seen at all times on the margins of these streams of traffic, waiting for an opportunity to pass in safety. Every year as the suburbs extend this inconvenience will be aggravated by an increased movement through these great arterial channels.

"Some ingenious person has suggested that bridges might be constructed to surmount these three thoroughfares, by which the

difficulty of the *insular* position of the Courts (in their sea of noise) might be overcome; that is, that we might mount from the pavement and descend to the ground-floor of the Courts every time we would transact a moment's business there, or speak to an official, and again remount and descend when we would return. We should thus have to choose between the chance of being run over and this laborious amusement of climbing these Rialti, or rather Bridges of Sighs, whichever we thought the lesser evil. The very suggestion betrays the infirmity of the site."

When an author raises an unsound objection, he is much to be commended for taking the trouble of removing it himself and carting away the rubbish. This labour our author has performed, and we hope he will accept our thanks for his pains. A few pages onwards he writes thus:—

"Referring again to the idea of bridges, which are absurd enough as cures for evils which might be altogether avoided, we would point out that the great stream of traffic which is to flow through Carey Street, in addition to the present one of the Strand, will increase the difficulty of communication between the two Temples and Lincoln's Inn. There might be no objection, but the contrary, to throwing a light bridge over the Strand, continuing it by a covered gallery to another bridge over the Carey Street thoroughfare, and descending by steps into Lincoln's Inn. Such a connection would obviate this additional severance of the Temple, and would promote the convenience of the several Inns of Court; and, in reference to the New Courts in Lincoln's Inn Fields, would place the Temple very nearly upon a par with Lincoln's Inn."

Our author abides by the maxim of praising the bridge that carries him safely over—to his own project; although when it was to land him on his neighbour's it was no better than a Bridge of Sighs! If it lead him into Lincoln's Inn Fields, the old gentleman bounds up the steps of his Rialto with the alacrity of a student hastening to his dinner in Hall, while if it only take him so far as the Strand site it is absurd and ridiculous—a "laborious amusement," and what not!

After this specimen of our good friend's argumentative prowess our readers will not be surprised to find that cover-

ing a portion of Lincoln's Inn Fields with buildings is gravely announced as a sanitary measure; the foliage and vegetation of the interior being, it seems, noxious instead of wholesome; while, of course, he thinks little of the importance of clearing away those fastnesses of vice and misery between the Strand and Carey Street, which Sir Charles Barry was of opinion would be one of the greatest improvements that could be made! And here we cannot but admire the ingenuity of our author in dealing with the sanitary question. He says that placing the Courts in Lincoln's Inn Fields would necessitate a variety of clearances in the neighbourhood, several of which, however, were projected long ago, without the slightest reference to the removal of the Courts from their present position. As, for instance, Mr. Bellamy's projected street seventy feet in width from Holborn to the Strand in continuation of Little Queen Street, with branches into Lincoln's Inn Fields, an opening very much required whether the Courts are removed or not, or wherever they may be placed after such removal. Having assumed that all possible improvements in the neighbourhood of Lincoln's Inn Fields must depend on his being permitted to encumber the Square with his new Courts, our friend, whose memory is a little on the wane, forgets that the choice of the Strand site will in like manner be connected with improvements, several of which, it may be admitted, are, like his own, required by the present wants of the neighbourhood, and are irrespective of its being applied to its new purpose.

With regard to sanitary matters, we have the highest authority for stating that there is no comparison between the choice of the two sites. Take Lincoln's Inn Fields, and you create a nuisance; take the Strand site, and you destroy one. The authority to which we allude hardly thought our veteran friend could be serious when he objected that the spacious area of Lincoln's Inn Fields was improperly called "a lung of the Metropolis," because it had not large openings into it, as if the air would not swoop downwards in refreshing streams wherever it could find room, but must move along the surface of the earth as the old reformer himself is obliged to do. It happened to us to read the passage of his pamphlet

in which this novel theory is broached while sitting in the library of Lincoln's Inn, and as it was a breezy day, though not to be called windy, we raised our eyes to observe the conduct of the trees. But, alas! we found them and their branches vibrating too and fro with the most callous indifference to the brilliant discoveries of our ingenious friend, of whom we must now take our leave, hoping he may be induced to write again, if not for our instruction at least for our amusement.

ART. VII.—LOCAL GOVERNMENT — URBAN, SUB-URBAN, AND RURAL.

1. *A Practical Treatise on the Law of Corporations in general, as well Sole as Aggregate.* By JAMES GRANT, Esq., of the Middle Temple, Barrister-at-Law. London: Butterworths, 7. Fleet Street: 1860.
2. *Report of the Commissioners appointed to enquire into the existing State of the Corporation of the City of London, and to collect Information respecting its Constitution, Order, and Government, &c.; together with the Minutes of Evidence and Appendix.* Presented to both Houses of Parliament by Command of Her Majesty. 1854.
3. *The Laws, Customs, Usages, and Regulations of the City and Port of London, with Notes of all the Charters, Ordinances, Statutes, and Cases.* By ALEXANDER PULLING, Esq., of the Inner Temple, Barrister-at Law. Second Edition. To which is now added, *A Summary of the Commissioners' Report on the Corporation of London, and the Municipal Government of the Metropolis, 1854, showing in what Particulars the Laws and Customs of the City are proposed to be altered.* London: Bond, 8. Bell Yard, Temple Bar; and Wildy and Sons, Lincoln's Inn Archway.
4. *Report of the Poor-law Commissioners on Local Taxation.* 1853.
5. *Third Report from the Select Committee on Private Bills.* Ordered by the House of Commons to be printed. 1847.

6. *Healthy Homes. A Guide to the proper Regulation of Buildings, Streets, Drains, and Sewers ; with a Postscript especially addressed to Surveyors and Commissioners of Sewers.* By WILLIAM HOSKING, Architect and Civil Engineer, one of the Official Referees of Metropolitan Buildings, and Professor of the Principles and Practice of Architecture, and of Engineering Constructions at King's College, London. London: John Murray, Albemarle Street: 1849.

THE question of local government has recently acquired peculiar importance from the discussions which have arisen as to the Corporation of the City of London, and the total want of system in the government of the British Metropolis. It is a great piece of good fortune that the whole subject comes at length to be considered together. Our inveterate habit of considering matters singly or piecemeal, which, by a singular misconception, we call *practical*, leads to the miscarriage of almost every measure of reform that is undertaken. We lessen or mitigate an abuse by erecting some anomaly. We construct nothing which is capable of progressive development without having as much to destroy as we make.

Government, among this most governing people, is less understood than almost anything else; and through fear of losing our independence of all control, we subject ourselves to the tyranny of every abuse.

The expression *piecemeal legislation* is in a very peculiar manner applicable to the laws which regulate local government in this country. A mere glance at the titles of the apparently heterogeneous publications enumerated at the head of the present article will serve to show how this comes to be the case. As one branch of the subject of local government, we have to consider the law of corporations in general,—so well handled in the best Treatise on Corporation Law—that of Mr. Grant. As another branch, must be regarded that of charters and grants of privileges. Then whilst we find a few general statutes bearing upon this subject, such as the Municipal Corporations Act, the Poor Law Amendment Act, the Lighting and Watching Acts, the Health of Towns and Nuisances Removal Acts, we have to keep in view as part of our *system* of local government the provisions of some

hundreds of local and personal Statutes creating, constituting, or regulating particular districts, and with them, also, the ancient privileges, liberties, and franchises which the Municipal Corporations Act of 1835 leaves untouched. The distinct laws, customs, usages, and regulations which govern the peculiar constitution of the City of London, the system of local government formed by county boards, hundreds, parishes, manors, leets, tithings, and villas, &c., and the thousand and one separate systems which arise from other sources.

The London Corporation Commissioners have collected some most valuable information, and gathered the opinions of experienced witnesses to show what is the operation of such conflicting regulations upon the inhabitants of the Metropolis of England, how far social security and prosperity is attained by them, what are their actual operation on the Merchant and Trader, how far economy as well as efficiency is consulted in the order and government of the important district to which their attention was peculiarly directed. The Commissioners comment at considerable length upon the complicated mass of the local laws of the Metropolis collected in Mr. Pulling's work. The Poor Law Commissioners' Report calls us from the consideration of the subject of Municipal Corporations, their constitution, order, and government, uses and abuses, to that of local taxation. Here, figures stare us in the face, and privileges come to have the utilitarian test applied of their actual worth in £ s. d., and lastly, after contemplating the origin and nature of these various franchises and liberties, and their *cost*, arises the ultimate question, said to be never absent from the mind of an Englishman, how does this contribute to his *comfort*? Has all this social machinery succeeded in really securing to us the "Healthy Homes" which Mr. Hosking advocates?

In modern times there has been a species of crusade against what is called class legislation, and the champions of Free Trade have almost succeeded in sweeping from our Statute Book those laws by which particular classes of the community have been [directly benefited to the prejudice of the rest. Much may yet be done, no doubt, in systematising the laws by which particular classes of the community are exclusively

regulated; but with regard to local government the practice of legislating for the few rather than the mass—fostering and creating privileges instead of securing general rights, is still warmly defended by those whose influence in this country is great, and by the mis-use of a French term of opprobrium, attempts to systematise the laws which peculiarly affect us in our own immediate homes are branded by the term *centralisation*.

Our constitution, derived as it is from such a variety of sources, countenances systems of local government, the machinery of which is incapable of working in harmony. The privileges which it was the policy of ancient Rome to grant to her free cities, the franchises and *liberties* which were wrung by the sturdy burghers of the middle ages from feudal tyrants, or were, regardless of general rights, afterwards so freely granted to Norman lords and royal favourites, are still to be traced in the ancient municipal corporations. The manors and seignories existing in this island, form a sort of patchwork with that general system of local government by counties, hundreds, and decennaries, which it was the policy of Alfred, so many centuries ago, to establish. And with the dis-use of charters of privileges and exclusive powers, has grown up a practice equally obnoxious to general right, and even more opposed to the formation of *system*,—that of local and personal statutes, by which Parliament concedes, at the prayer of particular bodies, isolated powers of local government which vary in their nature and operation according to the notions or plans of the applicants, or the caprice of the draftsman to whom the irresponsible care of framing such *private laws* is at present abandoned by our Legislature.

It is not perhaps possible to entirely regulate local districts by general law. Local as well as personal exigencies must constantly call for special provisions. Such, at all events, has been the notion acted on from the earliest times. To quote from one of the works before us:—

“The distinction between general laws and those applicable only to a particular district or class, is observed not only in our own code, but also in the Roman Law, and probably in most other systems of civil jurisprudence.

"Independently of those principles received into our Common Law from the peculiar system of local and municipal government recognised by the Imperial Code, which there is reason to believe was at one time in full force in this island, and existed in a modified form, both during the time of the Saxons, and subsequently under the feudal Sovereign, our Civil Code recognises various species of local and peculiar laws for the regulation and internal government of cities, towns, parishes, and districts, or of particular classes of traders, or other persons.

"These local or peculiar laws consist of ancient customs, privileges, and franchises sanctioned by immemorial usage; Royal charters and Acts of Parliament; local and peculiar statutes, having for their especial object the government and regulation of a particular district; bye-laws enacted by the inhabitants themselves, or those to whom the local authority, for the time being, is delegated; and, lastly, such modern usages and regulations as have imperceptibly become established in particular districts, or among particular classes for general convenience in relation to trade or other purposes."¹

The subject of special legislation and the practice of granting peculiar privileges and exemptions to local districts will be found discussed at some length in an article on "Private Acts of Parliament," in a former Number of the *Law Review*.² The Report of the Select Committee on Private Bills which we have now before us, less touches on the subject of the general principles of special legislation than the existing practice of Parliamentary Committees. The whole subject must ere long be fully discussed, and we are glad to be in a position to announce that the attention of the Law Amendment Society has been already directed to it.

Private or special Acts of Parliament at the present day are made to effect all that in ancient times constituted the *beneficia* and *privilegia* of the Imperial Code, and by the *charters of privileges* of the Middle Ages; but, unfortunately, the substitute is in many respects worse than that which preceded it; whatever is gained by the restraint imposed on the arbitrary exercise of the royal prerogative is counterbalanced by the carelessness with which arbitrary powers are

¹ Pulling's "Laws and Customs of the City of London," Introduction, p. 2.

² Vol. xviii. p. 336.

conferred by Parliament,—a system which was pretty closely attended to in the concession of privileges by the Crown, is almost altogether lost sight of in the delegation of powers by Parliament. General principles of law defined the extent — precedents settled the form of ancient grants of privileges, but private Acts of Parliament embrace almost every variety of provisos, powers, and duties.

If we look, then, to the actual ingredients of which local government in this country is composed, we find, at all events, variety enough to charm the lawyer.

One important branch of local law is composed of custom or usage, which, to use the phraseology of Lord Coke¹, “is one of the main triangles of the laws of England.” The force and operation of this branch of local law is thus described in a book of authority² :—

“The frequent repetition of an act which at first was assented to by the people of a certain place, for their mutual conveniency and advantage, is called a *custom*, and every such custom being certain and reasonable in itself, and commencing from time immemorial, and always continuing without interruption, has obtained the force of law, and in such places shall prevail, though contrary to the general laws of the kingdom.”

Our older text books, law reports, and abridgments contain a very extensive collection of local laws founded on ancient custom, many of which it was the especial object of Magna Charta and other early statutes to confirm; and Lord Coke observes that “to treat of the ancient customs of the City of London would require a whole volume of itself.” The peculiar operation of the City customs is thus spoken of by the Commissioners³ :—

“The customs of the City having been solemnly confirmed by Act of Parliament, have themselves the force of an Act of Parliament, and we have been told, in evidence, by witnesses peculiarly conversant with the subject, that the highest legal authorities are divided as to the effect of general Acts of Parliament

¹ Co. Litt. 1106.

² Bac. Abr. Custom, Ap. 564.

³ Report of London Commissioners, p. xv.; reference of Mr. Pulling, par. 859. 1895. 1900; of Serjeant Merewether, par. 5338, 5345; and Pulling's “Laws of London,” p. 3.

within the City, when they conflict with the City customs, and do not repeal them by express enactment.”

The subject of grants from the Crown, like that of ancient customs, forms a prominent feature in our older law books, to which the profession are still obliged to refer in order to ascertain the extent of the royal power in granting charters of privileges, and the construction of such solemn concessions. The modern practice of substituting special Acts of Parliament for charters from the Crown has in a great degree thrown this branch of legal learning into the shade, but it must be remembered that the construction of ancient charters, even at this day, repeatedly occupies the attention of our courts. The Municipal Corporations Act¹ repeals so much of all royal and other charters, grants, and letters patent now in force relating to the several boroughs named in the schedules A. and B. as are inconsistent with, or are contrary to, the provisions of that Act, and enables the Crown to grant charters to the inhabitants of any town or borough extending to them the provisions of the Act. It must be remembered, however, that the charters and local Acts not inconsistent with the Act still remain, and many questions have arisen since the passing of the Municipal Corporation Acts² as to the powers of the law in granting new charters.

Mr. Grant, in commenting on the decisions on these points, says it is settled,—

“1. That the grant of a charter of municipal corporation is still an exercise of the Common Law prerogative of the Crown, although such charter invests the corporation with the functions conferred by the Act upon the then existing municipal corporations which the Crown has only power to do by virtue of the latter of the Acts (7 W. IV. and 1 Vict. c. 78.)

“2. That the Crown may grant the charter to a part only (to be defined therein) of a town or borough, and need not grant it to the whole of the inhabitants of such town or borough, although the prayer of the petition is for a grant of a charter of incorporation, to the inhabitant householders of the said borough.

“3. That a petition, to be within the meaning of the Acts, need

¹ 5 & 6 W. 4. c. 76, s. 1.

² 5 & 6 W. 4. c. 76, s. 14., and 7 W. 4., and 1 Vict. c. 78. s. 49.

not proceed from a majority of the inhabitant householders of the place, or of the male inhabitant householders of the place.

"4. That whether such petition was, under all the circumstances, the petition of the inhabitant householders within the meaning of the Act, was a question of fact for a jury.

"5. That where the whole number of inhabitant householders was 48,000, and a petition was presented to the Crown, signed by 4,000, in favour of a grant of a charter of incorporation, and another was subsequently presented, signed by 6,000, against it, the jury were quite right in their verdict, that the former petition expressed the wish of the inhabitant householders within the meaning of the Acts; the direction of the learned judge at the trial being that, notwithstanding such last petition, Her Majesty had power, in his opinion, to grant the charter by virtue of the first petition, which direction was also correct.

"6. That the Crown, in the charter, besides defining the district within which the powers and jurisdiction of the corporation are to be exercised (which it is expressly bound to do by the statute, although, as it seems, the Common Law practice was always to do so, and that, therefore, this provision of the statute is merely inserted *ex abundanti cautela*) may, by its Common Law prerogative, appoint the number and set out the limits of the wards in the new borough.

"7. That a charter so granted was valid (having been accepted), but that the determination of the Privy Council to advise the Queen to grant the charter is not decisive of the question as to the sufficiency of the petition in favour of the charter.

"8. That the Crown may, in the charter, delegate to an individual, the power of appointing the first members of the corporate body, or may, at all events, appoint a person to ascertain who are the individuals possessed of the qualifications which the corporators are to have,—in other words, who are to be burgesses, and may appoint, in the charter, another person to revise the list of burgesses, and to act as the returning officer at the first election of officers under the charter." ¹

If charters from the Crown and special Acts of Parliament proceed for the most part from precedents, and tend to diversify the forms of local government of our cities and towns, much greater is the diversity which emanates from the bye-laws and ordinances of local authorities, or the usages of particular

¹ Grant's "Treatise on the Law of Corporations," pp. 16, 17.

districts. The Common Law authority of the inhabitants of towns and boroughs to make bye-laws is treated of under the title Bye-law, in Bacon's Abridgment, and the subject of the legislative power possessed by corporations in general, is well handled in Mr. Grant's book. In some ancient cities and boroughs the internal legislative power extended to a reconstitution of the corporation or governing body. This power, in the case of the ancient city of London, enables the Mayor and Aldermen, with the assent of the Commonalty, "when any customs theretofore used and obtained proved hard or defective, or any matters newly arising needed amendment, to apply and ordain a convenient remedy, as often as it should seem expedient." The Municipal Corporation Commissioners in their separate reports on the Corporation of London, in 1836, lay great stress on this peculiar circumstance distinctive of the City of London from other corporations; and in the report now before us the Commissioners refer to the possession of this power of self-reform by the Corporation of London as a circumstance which, considering the omission of the ruling powers to effect their own reform during the many years which have elapsed since the inquiry was commenced, *gives a peculiar character to the question.*

The precedents of the Poor Law Amendment Act, and the Municipal Corporations Act, have shown that it is equally practicable to reduce into a system the regulations affecting local government as any other. Our poor laws, up to the Act of 1834, had an unequal operation in different localities, regulations and usages merely local, combined with the varied provisions of special local statutes, really formed a part of the local rather than the general laws of the land. Notwithstanding all that has been said and written on the subject of *centralisation*, the innovation thereby introduced on our independent principles of local government and local taxation does not appear to have produced any of the serious results which were foreboded; and when we come to consider the economical part of the question, it may not appear unreasonable to hope that the system which this great change has laid the foundation of, may be followed in our other branches of local government.

The reform in our Municipal Corporations which followed the Poor Law Amendment Act, was in some respects even a more comprehensive measure of local government than that previously effected. It was more sweeping in dealing generally with a large mass of purely local regulations — in consolidating the law and repealing the provisions of inconsistent charters, franchises, and customs; but it still did not deal with *all* Municipal Corporations. It was less a general statute for regulating Municipal Corporations than a comprehensive measure for regulating the majority. Municipal Corporations may exist, and, as it has been already shown, the Crown may still perhaps constitute new corporations not subject to its provisions. The Act only deals with the corporations especially enumerated. Those which it excludes are still unreformed, and not only is this the case with the City of London, but with a number of other places, they having been omitted from the Act simply because the Commissioners were unable to gather authentic information respecting them. In South Wales, particularly, there are to be found towns and decayed boroughs in the possession of municipal charters, and many of them in possession also of corporate property unaffected by any general law which can check abuses, and in some instances that have been brought to our notice corruption and abuse continue to flourish in broad daylight. The Courts at Westminster might still, perhaps, correct some of them, though the ordeal would be expensive and dilatory, but generally speaking the only efficient remedy would be that afforded by applying to them the Act of 1835.

The London Corporation Commissioners thus speak of the general effect of the Municipal Corporations Act:—

“The operation of the General Municipal Act of 1835 may be described as twofold; first, it reformed the constitutions of all the enumerated boroughs. Secondly, with respect to many of them, it enlarged their districts by advancing their boundaries. This latter object was effected with respect to 93 boroughs, by the adoption of the boundaries of the parliamentary boroughs fixed by the Boundary Act, 2 & 3 W. 4. c. 64.”

With respect to the boundaries of boroughs, prior to the

Act of 1835, the Municipal Commissioners make in their First Report the following statement:—

“In most important towns, the suburbs have extended themselves far beyond the limits of the corporate authority. The population of the city and county of Bristol is 59,000; the suburbs beyond the city contain an additional population of 45,000. The population of the city of Rochester is only 9,891; the district immediately adjoining it, including the town of Chatham, comprises nearly 22,000 persons. The city of Carlisle contains 8,356 people; the suburbs are of as great extent, and contain a population of 10,713. At Hull the municipal borough contains 15,996; the county of the town, including the borough, 32,958; the suburbs, which are beyond the jurisdiction of the borough magistrates, contain 20,000 more.

“The principle adopted by the Boundary Commissioners with respect to the parliamentary boroughs, was to recommend the inclusion, within the new boundary, of those parts of the town which had been built since the original limits had been fixed. In their report to Lord Melbourne, dated 16th February, 1832, they state that they adopted as their guide the principle of including the whole of the modern town within the new boundary (Sess. Paper 36. 1832). The borough of Liverpool and the city of Bristol, in both of which the extension of the area of the parliamentary borough to a considerable distance beyond the old limits, was recommended by the Commissioners, may serve as examples of their procedure in this respect.”

The London Corporation Commissioners have not, in the case of the Metropolis, recommended an extension of the boundaries of the ancient city, with its present area of 723 acres, so as to embrace the 78,000 acres and 250 millions of inhabitants, constituting the actual Metropolis; but have recommended as a substitute the district incorporation of all the Metropolitan boroughs, and the adaptation of the municipal constitutions both of the city proper and the adjacent boroughs, with some slight variations, to the system of local government established by the Municipal Corporations Act: the ancient customs and ancient Courts of the city, its powers over the Thames, its separate police, and its exceptional magistracy, yielding to a system by which the whole Metropolis will be placed upon a uniform government.

When these changes are effected in the local government of the Metropolis, when system has been established at the fountain head, there will be some hopes of its being followed in the various departments of local government throughout the country. The very valuable Report of the Poor Law Commissioners on Local Taxation, shows the urgent necessity of this.

“The number of officers, say these Commissioners, engaged in assessing, collecting, levying, and keeping of local rates and taxes, and in accounting for them, and in auditing accounts is, as the law provides for them, much more considerable than is usually supposed. There are no less than 54 different species of officers; of each species there are often several individuals of each district. Their total number cannot be ascertained from any existing documents; but those in office simultaneously *cannot be less than* 180,000, of whom by far the larger portion are annual officers, to be succeeded every year by a like number of new officers. Their districts and their modes of appointment vary greatly.”

The Corporation of the City of London — the *giant abuse*, as it has been sometimes called — will no doubt be reformed. Its heavy and antiquated municipal machinery will give place to some which is more simple and less costly. The Metropolis of England will at length be invested with a municipal organisation, but these changes, great as they are, will be of secondary importance to what must follow the discussion of the subject; the general establishment of system, uniformity, efficiency, and economy in the local government of this country.

ART. VIII. — LAWS OF WAR.

1. *A Manual of the Law of Maritime Warfare.* By W. HAZLITT and H. P. ROCHE, Esqs., Barristers-at-Law.
2. *Commentaries on International Law.* By ROBERT PHILLIMORE, Advocate in Doctors Commons, and Barrister of the Middle Temple.

DECLARATION.

1. Her Majesty the Queen of the United Kingdom of Great Britain and Ireland having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the Powers with whom she remains at peace.

2. To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

3. It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

4. But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

5. It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships. And Her Majesty further declares, that, being anxious to lessen, as much as possible, the evils of war, and to restrict its operations to the regularly-organised forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

Westminster, March 28. 1854.

SUCH is our commencement of the Russian war. Fifty years ago a declaration like this from the Crown of Great Britain would have appeared an incredible fiction; and the veterans of Doctors' Commons may even now be scared by the

apparition of a document which savours so decidedly of what Lord Stowell rather contemptuously termed "a state of things not yet seen in the world, — that of a military war and a commercial peace."¹

As soon as a spirit of order entered into public international affairs, it became usual for belligerents at the commencement of a war to publish a declaration specifying the extent to which neutral Powers would be allowed to trade with the enemy. The prohibitions or restraints contained in these declarations have of course varied with the sentiments of the different governments by which they were issued, so that they scarcely furnish an authority from which a strict right of any kind can be deduced. Rarely, however, if on any occasion, has so innovating a manifesto been addressed by Great Britain to the nations of the earth. Her antecedent history too, has furnished no prelude to this sudden relaxation of the extreme rights of war. The declaration proclaims the temporary remission, and as some may, perhaps, think, the irrecoverable abandonment of maritime rights, which in former wars the blood and treasure of England have been lavished like water to maintain. We venture, however, to think the declaration a liberal concession to the advancing spirit of commerce, and a generous recognition by a powerful belligerent of the more merciful principles to which that spirit gives birth; albeit (*pace tanti viri*) Lord Stowell, in his aversion to Franklin's "quaker notions," would probably have condemned it as the fruit of "those loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world," and as "the elements of that system, which, if it is consistent, has for its real purpose an entire abolition of capture in war."² But when war breaks out, it seems reasonable to confine its effects, as far as may be, to the belligerent Powers, and to leave those who are no parties to the conflict in the enjoyment of all their anterior rights and liberties, with as little abridgment as the operations of war will allow. The spirit of this sentiment obviously pervades the British declaration; and in the re-

¹ 1 Rob. 362.

² 1 Rob. 362—363.

linquishment of the belligerent rights, which, under the British Orders in Council, were so strenuously enforced against neutrals at the beginning of the present century, we do not discover the loss of any solid advantage to our country in her foreign relations, or in the conduct of the war. On the contrary, the extinction of the risk of many irritating collisions with neutrals, is a consideration, which alone, is almost sufficient to out-weigh the imaginary advantages of asserting against them the extreme rights of war, and in no-wise derogates from the honour of introducing so lenient an application of those rights to actual hostilities. The project of this policy is sometimes said to have originated with the French Minister Drouyn de Lhuys, and to have been proposed by him for the acceptance of the British Government, which responded with alacrity to the suggestion. On this point, however, no certain information has transpired, though rumour has loudly commended the exertions of Lord Granville; but it is quite clear with reference to the practice of France and England in former wars, that neither nation could have ventured upon such a proceeding without the entire concurrence of the other; and the manifesto on the same subject by the Emperor Napoleon III., is in precise accordance with that of Great Britain. The French and English fleets can now act in harmony towards neutrals as well as towards each other; and on whichever side of the Channel the lenient scheme of belligerent policy may have been first entertained, we shall be surprised if it does not in the result infuse sentiments of respect and confidence into the mind of every neutral Power.

But we may remark as a singular feature of our popular constitution, that a state paper containing such extensive modifications of the rights of war can be issued to the world by the sole authority and upon the sole responsibility of the Minister. Nor has the voice of Parliament been yet expressed upon the subject. By the law and constitution, however, of this country, the Sovereign alone has the power of declaring war and peace; and he who has the power of terminating or removing the state of war, may exercise that

power to a partial extent by conceding some privileges which the laws of war ordinarily suspend.

There has therefore been no excess of jurisdiction on the part of the Crown or the Privy Council, in promulgating the important declaration which we have prefixed to this article.

Our immediate purpose is to consider the declaration in its bearings upon the much vexed proposition — “Free ships, free goods.” The authorship of this celebrated maxim is generally attributed to the Dutch; and long and laboriously have they and other nations, when in a state of neutrality, contended for its universal obligation. But, that free ships do *not* make free goods, is still (we apprehend) an incontrovertible doctrine of international law, sanctioned by principle, usage, and authority, and undisturbed by the shock of all those contentions which history associates with this subject.

One of the objects of the armed neutrality of 1780, set on foot by the Empress of Russia, and supported by the accession of France, the United States, Sweden, Prussia, Denmark, Spain, Holland, Portugal, and Naples, was to establish the principle that free ships make free goods, so as to exempt from capture the merchandise of enemies in neutral bottoms, and to enable belligerents to recruit their internal strength, and increase their resources for war, by the prosecution of their foreign and colonial commerce with the ships and under the cover of neutral flags. With this combination the Government of Great Britain was not then in a condition to grapple, as the war with her revolted colonies in America was still on her hands. But the similar convention of the Baltic Powers in 1801 was promptly quashed by Lord Nelson’s attack on Copenhagen; and Mr. Manning, who devotes a considerable portion of his work to the discussion of the question whether “free ships make free goods,” establishes the conclusion that the principles of the armed neutrality were at variance with the *Consolato del Mare* and the ordinances of the most distinguished maritime states, and contrary to the opinions of a long series of eminent jurists and statesmen upon the doctrines of neutrality. He examines also the principal treaties or conventions of the Powers of Europe from an early era, and points out the utter uncertainty and

inconsistency of theory and practice which these compacts display ; and draws the inference that the rule of "free ships, free goods" has no place in international law, unless upon the footing of express stipulation between individual states.¹

A transatlantic jurist of the highest eminence,—Chancellor Kent,—in speaking of the Baltic conventional law of neutrality, observes that :—

"It was soon abandoned as not being sanctioned by the existing law of nations, in every case in which the doctrines of that code did not rest upon positive contract. During the whole course of the wars growing out of the French Revolution, the Government of the United States admitted the English rule to be valid as the true and settled doctrine of international law, and that enemy's property was liable to seizure on board neutral ships, and to be confiscated as prize of war. . . . The two distinct propositions" (he continues), "that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board an enemy's vessel were to be restored, have been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be founded on the Law of Nations. . . . I should apprehend the belligerent right to be no longer an open question, and that the authority and usage on which that right rests in Europe, and the long, explicit, and authoritative admission of it by this country, have concluded us from making it a subject of controversy, and that we are bound, in truth and justice, to submit to its regular exercise in every case, and with every belligerent Power who does not freely renounce it."²

The powerful Republic of the United States, whose anxiety on maritime questions is at all times so sensitively exhibited, thus clearly disowns the existence of any rule of international law, recognising the principle of "free ships, free goods," and has in consequence laboured assiduously to secure to herself the benefit of the rule by means of special stipulations in her treaties with other nations. In the pursuit of this policy the United States have obtained the insertion of such provisions in their treaties with the following countries, viz., Algiers, Brazil, Central America, Chili,

¹ Mann. Comm. §08, &c.

Kent Comm. 126, &c.

Columbia, Ecuador, Guatemala, Mexico, Morocco, New Granada, Peru, Bolivia, Tripoli, Tunis, Venezuela, and likewise with the following Powers of Europe, viz., France, Spain, Sweden, Prussia, and the Netherlands. But the converse of the principle in question does not flow from these conventions; and it may be permitted to observe that if the stipulations contained in these treaties are not mere surplusage, they at least indirectly prove the rule against the operation of which they are intended to guard. But though Great Britain has on former occasions entered into treaties declaring that "free ships make free goods," we believe that no such treaty is now in force; the British treaty with the United States of America, in which that provision was embodied, having been cancelled by the rupture between the two countries in 1812, and not renewed at the restoration of peace.

So far, therefore, as the British declaration of 1854 waives the claim to seize enemies' goods in neutral bottoms, there is a voluntary and liberal concession to neutral nations of a privilege which they could not have demanded for their flags, consistently with the well-recognised principles of public law.

The urgency of the neutral maxim "free ships, free goods," arises out of the right of search; and the acrimony and irritation occasioned by the plenary exercise of this belligerent right have induced some nations to consider even a state of war less grievous than the burden of neutrality. By taking a view, therefore, of the right of search, and the principles on which it is founded, we shall be likely to obtain a clearer notion of the scope and effect of the British declaration, and its influence upon the maxim in question.

In maritime warfare, that respect for private property which characterises military operations on shore finds no place or recognition. The diminution of the enemy's resources, by obstructing and crippling his foreign commerce, and making reprisals against his ships, goods, and property of all kinds found upon the ocean, has ever been deemed a justifiable method of conducting hostilities; and to this end the severest construction of the rights of war has always been

applied to hostile private property captured at sea. Hence the rule is well established, that the goods of an enemy found on board the ship of a friend are good prize, and (according to British and American decisions) that the goods (not being contraband) of a friend on board the ship of an enemy ought to be restored; but that contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality, and becomes an act of hostility, involving the penalties of that position. Neutrals and belligerents are equally in subjection to the public law of nations, which requires the observance of good faith, and no sooner is war declared between two hostile powers, than neutrals become charged with a conscientious obligation to refrain from aiding either belligerent, directly or indirectly, with the means of prosecuting the war or maintaining the struggle. In the words of Hubner, "the great champion of neutral rights," entire inaction in all matters relating to the war is the true line of neutral conduct. Here, however, human frailty and the thirst of gain intervene; and neutral shippers and merchants attempt to supply one or other of the belligerents with articles of merchandise (commonly called contraband goods), for which the state of war creates a specific demand, or to secure to themselves the profits of the carrying trade, which the vessels of belligerents are prevented by hostile cruisers from pursuing without peril of capture. If, therefore, unrestricted commercial intercourse with the enemy were permitted to neutrals, it is obvious that the enemy's resources for warlike purposes would be greatly strengthened, and his means of carrying on any other species of advantageous intercourse under colour of commercial transactions would be manifestly enlarged.

To check all illicit correspondence with, and assistance to the enemy, under the mask of trade, is therefore the undisputed right of every belligerent. In ancient times neutral trade of any kind was virtually prohibited, or existed only on sufferance during war. But gradually these restrictions have been lightened, and confined to those commercial operations,

which would directly affect the issue of the war. Neutrality, however, cannot be enforced without a system of maritime police, to be exercised by the commissioned cruisers of the belligerent Powers, which visit and search all merchant vessels sailing under neutral colours, and ascertain by such examination the nature and destination of their cargoes and the nationality of the vessels. For if any maritime capture of enemies' goods be allowed at all, the right of search must also be conceded, in order to ascertain whether the ship or cargo encountered be liable to seizure; and Bynkershoek treats the right of stopping a neutral vessel at sea for the purpose of examining her papers, as an uncontested incident of war, to prevent fraudulent shipments, and the fraudulent assumption of neutral colours.¹

"That the right," says Lord Stowell, "of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may; because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal

¹ Qu. Jur. Publ. lib. i. c. 14.

harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.”¹

The American authorities are equally explicit as to the subject of neutral flags to the right of search.

“To detain for examination is a right, which a belligerent may exercise over every vessel, not a national vessel, that he meets with on the ocean: and the belligerent is not answerable for any injury that casually results from the reasonable exercise of his rights.”²

“Neutral ships do not afford protection to enemy’s property; and it may be seized if found on board of a neutral vessel beyond the limits of the neutral jurisdiction. This is a clear and well-settled principle of the law of nations.”³

But the English Admiralty Court on condemning such property to the captors requires that they should pay the freight, on the principle that by taking the goods, they also succeed to the liabilities of the hostile owner in respect of it.

In the exercise of the right thus distinctly propounded, great injury has doubtless been inflicted on neutral commerce by erroneous seizures, and unjustifiable detention of ships, cargoes, and mariners; and a remedy against these evils has been sought in the restriction of the right of search, by the common consent of the leading maritime Powers, whose commercial treaties bear witness to the general desire of placing this right upon a less noxious footing, and of adopting the broad rule that the flag covers the cargo—a rule which not only includes the maxim, “free ships make goods,” but even

¹ *Maria*, 1 Rob. 360.

² *The Eleanor*, 2 Wheat, 345.; 4 Cond. Rep. 149.

³ Kent’s Comm. i. 124.

the correlative proposition of the old French ordinances, "*Lia robe d'ennemie confisque celle d'ami.*" From this course of things it was impossible to avoid the conclusion, that some beneficial limitations of the right of search would be adopted in future to wars; and the present declaration of the British Government is honourable to itself and conciliatory to neutral states in its voluntary recognition of claims, which Great Britain so strenuously denied when asserted by hostile menaces and conventions. After this concession on her part, we may almost venture to predict, that no other rule of belligerent conduct towards neutrals will henceforth be accepted by those states which possess the means of securing respect to their own wishes and opinions: and that the text of the British declaration will for ever hereafter be regarded as the true standard of international doctrine.

Into the subject of contraband we do not here propose to enter; as, if the right of search be admitted in the smallest degree, the prevention of supplies, of munitions of war from reaching the enemy through the hands of neutrals, cannot be deemed other than a just application of that right.

The definition of contraband has never been accurately determined, but the modern improvements of science will obviously introduce into the catalogue of prohibited merchandise, engines, and component parts of engines, and other munitions, of which the existence was unknown in former wars. The catalogue of goods *incipitis usus* will probably also be extended to coals and other merchandise which recent discoveries have rendered applicable to warlike purposes. But so far as the general law of contraband is concerned, it remains in all other respects on its former footing, unaffected by the British declaration.

The despatches of the enemy are in the nature of contraband goods, and have ever been deemed just objects of the right of search. The penalty of conveying such despatches is confiscation of the neutral vessel.

The effect of those despatches is always presumed to be hostile to the captor, because they necessarily relate to the public affairs of the enemy and to the maintenance of a communion between the departments of his government. A

single letter may contain the plan of a campaign, or information of the utmost importance to his public functionaries or correspondents, and its safe transmission may determine the result of the war, so that no contraband merchandise can possess a more noxious character towards the other belligerent. The right, therefore, of seizing such despatches is very properly reserved by the British declaration.

"It has been asked (says Lord Stowell), What are despatches? to which I think this answer may safely be returned; that they are all official communications of official persons on the public affairs of the Government. The comparative importance of the particular papers is immaterial, since the court will not construct a scale of relative importance, which, in fact, it has not the means of doing with any degree of accuracy, or with satisfaction to itself; it is sufficient that they relate to the public business of the enemy, be it great or small. It is the right of the belligerent to intercept and cut off all communications between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve. It is not to be said, therefore, that this or that letter is of small moment; the true criterion will be, is it on the public business of the state, and passing between public persons for the public service? That is the question. If individuals take papers coming from official persons, and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs, and consider their relative importance. For on what grounds can it proceed to make such an estimate with any accuracy? What appears small in words, or what may perhaps be artfully disguised, may relate to objects of infinite importance, known only to the enemy, and of which the court has no means of judging. The court, therefore, will not take upon itself the burden of forming such a scale, but will look only to the fact, whether the case falls within the general description or not." ¹

The declaration is silent on the subject of conveying the enemy's officers, civil or military, as passengers on board

¹ 6 Rob. 465.

neutral ships. Such persons are often shipped in the disguise of a mercantile character to avoid capture by belligerent cruisers. But neutral vessels thus employed are subject to condemnation by the general law, the application of which will, we apprehend, continue in full force during the present hostilities with Russia.

The last point which we desire to notice in the British declaration is one respecting which we entertain some misgivings, whether neutral Powers will deem the ostensible concession so great an act of condescension as our Government may have intended. Whoever publicly waives a right declares by implication that he possesses it, or that his claims to it have never been overruled; and when the Crown announces its intention to refrain from confiscating neutral goods (not contraband) found on board an enemy's ship, the reader might not unnaturally suppose that the course of action so graciously abandoned was one which the Crown had a clear anterior right to pursue. Let us briefly refer to a few of the writings which are commonly received as authorities upon the subject of Public Law, for the light which may assist us in forming a judgment on the present point.

The *Consolato del Mare*, the earliest maritime code now extant, contains the following passage:—

“If the ship (captured) should belong to the enemy, the cargo being either in the whole or in part neutral property, some reasonable agreement should be entered into on account of the ships now become lawful prize, between the captors and the merchants owning the cargo.”¹

Here is nothing like confiscation of the neutral cargo.

Grotius states, that goods found in an enemy's ship are not to be treated absolutely as the property of the enemy. The presence of the goods on board the ship is a presumption that they are enemy's property, but this presumption may be rebutted by evidence to the contrary, and then they are to be released.²

Locrenius, the Swedish jurist, writing in the middle of

¹ Cap. 273. s. 6.

² De Jure, B. and P., lib. iii. c. 1.

the 17th century, pronounces that goods in an enemy's ship are to be treated as hostile property until the contrary be shown, but if this can be done they ought to be released.¹

Molloy, again, thus expresses himself:—"If the goods of friends are found in the ships of enemies, this does not *ipso facto* subject the same to be prize by the Law of Nations, though it be a violent presumption, and may justly bear a legal examination."²

Heineccius, the author of an approved work, published in 1721, on Maritime Captures, expressly states, that the goods of a friend found on board the ship of an enemy ought to be released.³

Bynkershoek likewise concurs in the doctrine that the enemy's ship is lawful prize, but that the neutral property on board is free. His work appeared in 1737. "*Cape; si potes quodcunque est hostis tui, sed mihi redde quod meum est, quia amicus tuus sum, et impositione rerum mearum nihil sum molitus in necem tuam.*"⁴

The reply of the British Government to the Prussian memorial of 1752 treats it as a settled rule, that the goods of a friend ought to be given up to him, although found on board the ship of an enemy. This masterly state paper is supposed to have been framed by Lord Mansfield.

Vattel is the next writer in order of succession. His work was published in 1758. He thus expresses his views:—"The effects of neutrals found in an enemy's ship are to be restored to the owners, against whom there is no right of confiscation."⁵

Lord Liverpool's celebrated "Discourse on the Conduct of the Government of Great Britain towards Neutral Nations" assumes the same doctrine as the settled practice of this country. This pamphlet appeared about the same time as Vattel's "Treatise on the Law of Nations."

Chancellor Kent also thus addresses himself to the same point:—

"During the whole course of the wars growing out of the French Revolution, the Government of the United States admitted

¹ De Jure Maritimo et Navali, lib. ii. c. 4. s. 11.

² Book i. c. 1. s. 18.

³ Quæst. Jur. Publ. lib. i. c. 13.

⁴ De Navibus, &c., c. 2. s. 9.

⁵ Lib. iii. c. 7. s. 115.

the English rule to be valid, as the true and settled doctrine of international law. The two distinct propositions that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board an enemy's vessel were to be restored, have been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be founded on the Law of Nations."¹

"It is a principle," says Chancellor Kent, "of the law of nations relative to neutral rights, that the effects of neutrals found on board of enemy's vessels shall be free; and it is a right as fully and finally settled as the other [that enemy's property on board neutral ships is not free]: though, like that, it is often changed by positive agreement."

After referring to the *Consolato del Mare*, he thus proceeds: —

"The former ordinances of France of 1543, 1585, and 1681, declared such goods to be lawful prize; and Valin justifies the ordinances on the ground that the neutral, by putting his property on board of an enemy's vessel, favours the enemy's commerce, and agrees to abide the fate of the vessel. But it is fully and satisfactorily shown, by the whole current of modern authority, that the neutral has a perfect right to avail himself of the vessel of his friend to transport his property; and Bynkershoek has devoted an entire chapter to the vindication of the justice and equity of the right."²

"The rule that the goods of an enemy found in the vessel of a friend are prize of war, and those of a friend found in the vessel of an enemy, are to be restored, is a part of the law of nations, and has been fully and unequivocally recognised by the law of the United States."³

The French Law and Practice has undoubtedly been always opposed to these authorities, which are, in our opinion, conclusive against the view apparently taken of British rights by the authors of the declaration. It may, however, have been thought necessary to exhibit a complete accordance between French and English Governments in this as well as other matters connected with the war. But we regret that any clause of a declaration so liberally conceived should be disentitled in the eyes of neutrals to those

¹ Kent's Comm. i. 126, &c.

² Kent's Comm. 127, 4th edit.

³ *The Nereide*, 9 Cranch. 388.; 3 Cond. Rep. 439.

commendations which the general scope of the instrument will infallibly secure to it at home and abroad.

The only legal publication of a substantial nature which the present occasion has called forth, is "A Manual of the Law of Maritime War," by Mr. Hazlitt and Mr. Roche, in which all the doctrines relating to these interesting subjects will be found very fully collected, and illustrated by the principal judicial authorities' decisions of England and America. This work is in use in the principal offices of State, and is supplied also to the British embassies in foreign countries as a ready guide for solving the numerous and difficult questions which the long discontinuance of war with European Powers has rendered rather unfamiliar to our diplomatists.

Dr. R. Phillimore's publication is the first part of a large and comprehensive work, extending to all the various branches of international law, and is in nowise confined to war or to the rights of belligerents. It has not been called into existence by the present crisis, but is the fruit of long previous study and preparation; and we notice it here as a work which bids fair to remedy the deficiency which has so long existed in our legal libraries, and which even the admirable works of Story and Wheaton are insufficient to fill up. This will be a work for the student as well as for the more advanced jurist, and we trust that Dr. R. Phillimore will apply his best energies to the completion of the undertaking thus worthily commenced.

**ART. IX. — ANNUAL REPORT OF THE SOCIETY FOR
PROMOTING THE AMENDMENT OF THE LAW.**

ELEVENTH ANNUAL REPORT OF THE COUNCIL.

IN reviewing the proceedings of the Society during the past year for the purpose of presenting their Eleventh Annual Report, the Council are gratified to have to observe on the steady progress of Law Reform.

A year marked by great national excitement,—spent either in the immediate anticipation, or in the actual prosecution, of a foreign war, was not likely to be distinguished by many improvements in our internal administration. Least of all was it probable that a subject so technical as the Amendment of the Law must, in the present state of our jurisprudence, necessarily be, should attract popular attention in any great degree. Yet the Council are happy to reflect that no retrogression in public opinion concerning Law Reform has been observable, that the labours of the Society have been steadily pursued, and that several measures framed to effect substantial improvements in our law, have during the present Session been introduced into Parliament. The subjects which have chiefly occupied the attention of the Society have been, Law Reporting—the Ecclesiastical Courts—the Reformation of Juvenile Offenders—the Assimilation of the Commercial Laws of the United Kingdom—the Commission on the Inns of Court—and the Appointment of a Minister of Justice.

LAW REPORTING.

On this important subject a Committee of the Society have, during the last year, made a second Report, in which they urge the necessity for establishing a system of authorised Reports, which should supersede the many publications of the kind now in existence. It cannot be doubted that the

number of different Reports of the decisions of our Judges, no less than the prolixity of many of them, has tended to increase the uncertainty of the law, while it has entailed a heavy burden on the legal profession. The Council cannot venture to hope for the immediate cessation of an evil which, remarked on three centuries ago by Lord Bacon, referred to continually by our best judges and jurists, and never defended seriously by any one, has yet been suffered to continue without any vigorous effort for its removal. Yet they trust that by once more drawing attention to its existence, and even to its increase, they may be hastening the time for its ultimate, though it may not be its speedy extinction.

ECCLESIASTICAL COURTS.

Great interest has been felt in the Society in regard to the Report on these Courts, made after long and arduous deliberation by a numerous Committee. Valuable assistance had been rendered in the preparation of that Report by several gentlemen of eminence connected with Doctors Commons, and it was satisfactory to find that a general concurrence of opinion existed as to the expediency of an extensive reform. Some difference of opinion, however, arose as to the nature of the change that ought to be introduced; for while some contended for the retention of the Ecclesiastical Courts on an amended plan, others recommended the transfer of their jurisdiction to the Courts of Chancery or of Common Law, or to the County Courts, while a third course was proposed for establishing a new Court altogether. Several animated discussions took place in the Society previous to the adoption of the Report, but at length a series of resolutions was carried, recommending that the jurisdiction of the Ecclesiastical Courts in all testamentary matters should be transferred to the Superior Courts at Westminster, which should be clothed with full powers both of Law and Equity, and should each be open to the suitor at his option, and that the County Courts should be made ancillary to the Superior Courts in this matter. During the present Session of Parliament a Bill has been introduced by the Government for the transfer

of the testamentary jurisdiction to the Court of Chancery, and it is probable that it will shortly become law. There is no doubt that such a measure will work a considerable improvement of a practical nature in this branch of our jurisprudence, and remedy abuses which have long been justly considered as a national reproach; but at the same time the Council conceive that a reform upon a broader basis would have been desirable, and that great good would have resulted from extending the transferred jurisdiction to that side of Westminster Hall in which the machinery for resolving disputed facts in the most satisfactory manner is already in existence, and to those local tribunals which are in the long run best fitted for administering cheap and expeditious justice. It may be anticipated, however, that in the certain, though future, event of a complete fusion of Law and Equity, the Common Law Courts will be invested with a jurisdiction over testamentary matters.

The Divorce Bill, now before Parliament, which is founded chiefly on the recommendations of the Commissioners appointed to investigate the subject, will still further deprive the Ecclesiastical Courts of their present anomalous jurisdiction, while it will relieve the House of Lords of their present quasi-judicial duties in reference to divorce cases. It has been justly considered a great grievance that divorces *à vinculo* have been practically denied to all but the wealthier classes; by the Bill of the Lord Chancellor this evil will be remedied; and it is probable that other improvements will at no distant time be introduced into the existing laws on the subject.

TREATMENT OF JUVENILE OFFENDERS.

This interesting question has made considerable progress during the past year; and in December last a Conference, being the second on the subject, was held at Birmingham, and was very numerously attended by persons from all parts of the kingdom. To this Conference the Society sent a deputation, in order to mark their sense of the importance of

the object in view, and a Committee was also formed, by whom the best mode of effecting the reformation of juvenile offenders was fully considered, and who made thereupon a valuable Report. Some difference of opinion exists in the Society, as elsewhere, on the minor points connected with the subject; such as the question of the age at which offenders should be made liable to the provisions of any statute that may be hereafter passed for the establishment of reformatory institutions; and such as the conflicting theories in reference to the preceding punishment, if any, to be inflicted on those entering asylums of such a nature. But on the broad principle of the necessity under which this nation lies, alike from motives of public policy, and from the dictates of Christian benevolence, to adopt some plan for cutting off the sources of crime, and for rescuing those involved in it from a further career of guilt, no doubt is in any quarter entertained. It is true that there are many difficulties in the subject, that much prejudice still remains to be overcome, and that many practical obstacles still obstruct the path. But the vast impetus which has lately been given to public opinion on this question, the aid that is now proffered in so many quarters to the original labourers in this field, and the attention which it is attracting from the Government and the Legislature, are among the most striking proofs ever witnessed of the certain ultimate success of every good cause which is followed with perseverance and courage. Whatever temporary delay may arise in the general establishment of institutions for the reformation of our younger criminals, it may be confidently expected that an object to which so much self-sacrifice and benevolent exertion have been devoted will at length be triumphantly attained.

ASSIMILATION OF COMMERCIAL LAW.

The Council are happy to remark that the labours of the Conference held in the year 1852 in the rooms of the Society, and the exertions since that time of the Committee nominated on this important subject, have not been without

legislative result. The Commission appointed by the Crown to consider, among other subjects, the assimilation of the commercial law throughout the United Kingdom, have not yet indeed given to the public the result, if any, of their inquiries. But two measures of considerable importance, which will each tend to fuse our present conflicting codes, have been during the present Session introduced into Parliament, and will no doubt shortly become law. The Bills of Exchange Bill, brought in by Lord Brougham, has for its object to introduce into England the mode of recovering on dishonoured bills of exchange and promissory notes which has long existed in Scotland, and is there known by the name of summary diligence. It may be confidently expected that the same beneficial effects which have been found to result in Scotland from the system, will follow from its adoption in this country : that defences for the mere purpose of delay, defeating thereby in many cases the claims of the creditor, and in all cases postponing his remedy, will be more seldom resorted to, and that credit will be placed on a firmer basis, without any check being given to its legitimate exercise. The Judgment Execution Bill, brought in by Mr. Craufurd, is also a measure of importance, and will doubtless be followed by no small advantages to the mercantile community. A Bill has been introduced by Mr. Butt for giving the same force to subpoenas to witnesses in civil cases in the three kingdoms, which Mr. Craufurd's Bill gives to judgments ; and both these measures seem certain of being carried immediately.

The Scotch Bankruptcy Bill has been postponed for the present ; but there is every reason to hope that the united voice of the mercantile community in England, and the wishes of the great majority of that class in Scotland, will soon prevail to secure its success. But it should seem that at this moment, when a similar Bill for Ireland is before Parliament, when important changes in the English Bankrupt Law are announced upon the Report of a Commission, the opportunity ought to be taken of introducing one and the same system for the three kingdoms, according to the

strongly expressed opinion of the Conference of November, 1852.

It is a great satisfaction to the Council that the principles which this Society has been the chief means of bringing prominently before the public, are thus obtaining recognition from the Legislature, and are already beginning to bear their legitimate fruit.

COMMISSION ON THE INNS OF COURT.

The Society has for several years, and, indeed, ever since its first existence, laboured to draw the attention of the public and the profession to the imperfect state of legal education in this country, and to the abuses existing in the Inns of Court. Only in the present Session Mr. Napier, late Attorney-General for Ireland, acting chiefly upon a suggestion from this Society, brought the subject under the notice of the House of Commons, and obtained an address to the Crown praying for a commission of inquiry. The Society resolved, on the success of this motion, on sending a deputation to the Lord Chancellor to call his Lordship's attention to the great importance that attached to the manner in which the Commission might be issued; and the result of an interview with his Lordship was that the Inns of Chancery were included in the Commission, and that, at his Lordship's request, there was furnished to him by the deputation a list of names of persons eminently qualified to discharge the duty of Commissioners.

It is much to be wished that the result of this long-needed inquiry, and of the suggestions of those composing the Commission, may be the reform of any existing abuses, the improvement and extension of legal education, and, above all, the establishment of responsible government in the Inns. The public have a right to expect that any legal university which may be formed shall possess internal guarantees for its proper working, and shall be made conducive to the advancement of national education.

MINISTER OF JUSTICE.

The Committee appointed to consider this important subject have lately reported in favour of the establishment in the government of a department of justice, charged with the superintendence over all the legal matters connected with legislation and with administrative government. The feeling that has arisen in favour of uniting the duties pertaining to each branch of State under one head, instead of scattering them through a number of various and conflicting offices, has been very lately evinced in the creation of a separate Ministry of War. Precisely the same argument that has been used so forcibly for this latter change may be employed to demonstrate the necessity of a Minister of Justice; and unless it can be shown that the affairs of peace, and the policy of internal improvement, are of less importance to the national interests than the temporary exertions of war, it may be safely foretold that the force of public opinion, and the efforts of the two Houses of Parliament, will at no distant date compel the executive to place the legal administration of the country under one responsible head. By all Law Reformers such a change must be peculiarly desired, because we can hardly hope for any consistent and comprehensive plan for the amendment of the law, until such a duty has been formally entrusted to a Minister fitted to fulfil it, and with the time requisite for its performance on his hands.

The Committee are glad to notice that several measures for Law Reform have been this session before Parliament, in addition to those with which the labours of the Society during the past year have been more especially connected. The Common Law Procedure Bill is a valuable measure, recognising, and, to some extent, giving effect to the great principle of fusion of Law and Equity, and adopting for the Superior Courts the plan of enabling the parties to try before a Judge alone, which has worked so well in the County Courts. It also embodies the main provisions of Bills introduced by the President of the Society for amending the Law of Evidence and Arbitration, and dispensing

with jury by consent of parties. The Bill of Lord Harrowby, for registering Bills of Sale, is a measure of great benefit in checking fraudulent practices; and Mr. White-side (late Solicitor-General for Ireland) has introduced a Bill for extending to that part of the United Kingdom the provisions of the English Procedure Bill of this Session, together with other and further improvements contained in his Bill of last Session, but which were dropt from that Bill owing to the advanced period at which it was introduced. The Criminal Law Procedure Bill, introduced by Mr. Aglionby, for remedying the evil of sending to the Session those who have committed offences of a lighter description, will be a great improvement in our criminal jurisprudence; while the Public Prosecutors Bill of Mr. Phillimore, though dropp'd for a time, will no doubt soon reappear to be successfully carried, unless the Government should in the meanwhile take up this important subject. At the same time, the labours of the Statute Law Commissioners, who have lately produced their third Report, can hardly fail to be productive of renewed efforts, with more adequate means, for the consolidation, if not the codification, of our law. The appointment of a permanent Board for the improvement of our Statute Law, which has been recommended in the third Report of the Commissioners, and which is probably imminent, will gradually bring about a better mode of legislation, and a remedy for the confusion and consequent uncertainty which now unfortunately characterise our written law.

It may be justly considered, from the facts stated in the preceding remarks, that Law Reformers have no reason to dread any retrogression in public opinion in respect to the principles which they support: and that the object for which the Society has long and consistently striven, — that of the amendment and simplification to the utmost possible extent of our national jurisprudence — can assuredly be obtained if prosecuted with a vigour, perseverance, and resolution commensurate with its own importance.

ART. X. — METTRAY.

Mettray: a Lecture read before the Leeds Philosophical and Literary Society. By ROBERT HALL, M.A., Recorder of Doncaster.

MANY good law reformers are, we hope, preparing for the next campaign by a long excursion, getting as far away from books and papers as they can; but if we may judge of others by ourselves, there is a puzzling preliminary to be settled. Where shall we go? Watering places will not do — we never saw one yet of which we were not heartily tired in three days, and not unfrequently in three hours; besides, penny postage brings down all that should have remained quietly collecting dust at Chambers. We can point out a good escape.

There is a very pleasant tour to be made down the Loire. Go from Paris to Orleans by railway. Visit the great scenes of Anglo-Norman and French history. In a few days you will find yourself at Tours within five miles of Mettray. If you are doubtful of the possibility of reforming young offenders by the score and by the hundred, proceed to Mettray, and whatever amount of scepticism you may take with you, we can be responsible for your bringing none away. If you are already a convert, still go to Mettray, and enjoy the spectacle of your own aspirations and day dreams become realities even brighter than you had ventured to imagine them.

But you will want a guide to Mettray to teach you "how to observe." Buy, then, Mr. Hall's lecture and study it well. Here are a few samples of the bulk, which, by the way, is not formidable, consisting only of fifty pages: —

"I will not detain you with their dietary, which is the same as that which is usual for the farm-boys in the district; it will be admitted that the vin ordinaire of the country mixed with water in the proportion of one to four, will bear a comparison with the 'rare sober liquor' of the nursery rhyme. What practical notions of sensual luxury are to be obtained within the limits of Mettray, you may judge from the fact that the average cost per diem for

each colonist is as follows:—Board, 3*d.*; clothes, a considerable fraction less than 1½*d.*; fire and light, 2-1000 of a penny; washing 4-1000 of a penny; the board of the *employés* amounts only to 7*d.* a day. Of course everything is laid in at wholesale prices, in the cheapest markets, and a premium is given to such of the colonists as keep their clothes in a condition to be worn beyond the time fixed as that of their proper duration. Viewed as a condition of physical existence there is certainly nothing very attractive in all this: it has been throughout a leading object to offer no attractions but to the moral sense. It is not uncommon for the young people soon after their first initiation, to ask to be sent back to the House of Correction, where the tension of the system is less unrelenting, and some trifling indulgences are not prohibited.

“The sleeping accommodations can hardly be considered luxurious, even when compared with the filthy dens in which the vagrant populations crowd together for the night, at least not to the taste of persons of that description. The same room serves as refectory by day and as dormitory by night: each colonist has his hammock, which, on the signal from his chief, he takes from the wall where it has been suspended by day under his own clothes shelf, and fixes it half way across the room, in which there are two rows with a passage between, and so disposed that heads and feet alternate.”

So much for the luxury with which Mettray has been charged.

“Now for the practical results.

“Since the foundation of the colony the number of colonists that have left it at the expiration of their appointed term, some of them as young as twelve years of age, has been 953; of these 774 have continued irreproachable, 58 have conducted themselves tolerably, 18 have declined the patronage of the society, or been lost sight of, 103 have again been the objects of criminal prosecution, and the comparative statistics of relapse stand as follows:—

“Juvenile prisoners discharged from La Roquette generally 75 per cent. in three months.

“Orphans educated in the Wurtemberg institutions, 25 per cent.

“Adults in France—Men, 35 per cent. in five years; women, 27 per cent.

“Mettray, 11 per cent.

"In comparing these figures it must be borne in mind that an act of simple vagrancy, if made the subject of a criminal prosecution, counts as a relapse; and that Mettray scrupulously accounts for every colonist that has been liberated from its control from the very first who received his discharge in 1840, whilst the Patronage Societies, and some other colonies take account only of the parties discharged within the last three years; thus the Société des Jeunes Détenus exhibits a proportion of relapses of only $6\frac{1}{2}$ per cent.; and if the account for Mettray were confined to the colonists liberated during the last three years it would show only 10 relapses for 304 individuals, or little more than 3 per cent."

Mettray "is said to be a temptation to crime: this placing of criminals in such pleasant places, and making their condition so much better than it would have been had they never sinned; moreover, that the taking these children and tending them so carefully, is a premium to all sorts of parental abandonment. It is very true that the homestead of Mettray stands in the midst of a beautiful garden, but the living there is a life of constant toil and sternest discipline, and, until the mind is to some extent sensible of moral beauty, must be extremely irksome. No one instance has yet been heard of in which a young person committed an offence, in the hope of going to an agricultural colony, or in which parents have turned their children into the streets for the purpose of having them sent there. This is more than can be said of either imprisonment or transportation. Lord Brougham, during his recent visit to Mettray, made this point the subject of particular investigation, and could discover no traces of a desire in the past of any person to be sent there or to have his children sent there."

The following observations show that Mr. Hall can not only observe accurately, as we can testify from our personal knowledge of the Institution he has done, but that he thinks deeply. After having disposed of an ill-founded objection, that the system turns too much on military discipline, he continues thus:—

"To my mind a much more serious objection is the danger of the system collapsing when the devoted men to whose untiring zeal it has been indebted for its brilliant successes hitherto shall have been removed from their sphere of usefulness on earth; we have too often seen ultimate failures of this description, and it is

no answer to say that the colony has worked with unimpaired vigour during periods, sometimes of several months, when M. De Metz has been absent, engaged on the organisation of other colonies. But amongst master spirits there is this noticeable distinction :— all alike successful in striking out some line of organised action, some of them hold their assistants in a species of subjection which prevents their co-operation from ever being warmed by the smallest spark of independent vitality :— they identify their system with themselves, with them it lives, with them it languishes and dies. I am sorry to say this is the more usual type ; a subtle form of ambition, that last infirmity of noble minds, is the secret agent of an unconscious egotism. Others again, if I may use the antithesis, identify themselves with their system, succeed in animating their agents with the spirit and power of independent action, and in the grand procession of humanity commit the torch, which they may themselves no longer bear, to hands as vigorous and as zealous as their own. In this extremely rare type I believe M. De Metz to have been moulded ; you cannot converse for half an hour with any of the young gentlemen who are at present employed as chefs and sous-chefs at Mettray, without discovering that they are every one of them animated by the spirit of the place, and have only one ambition, that of being sometime the directors of a colony. In fact, thirty-five other colonies have been established on the model of Mettray, and I believe are in successful operation. The answer seems to be almost conclusive so far as regards France."

SELECTION
OF
ADJUDGED POINTS
REPORTED SINCE 1ST MAY, 1854.

POINTS DETERMINED IN THE COURT OF CHANCERY.

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Master of the Rolls - - -	

I. POINTS DETERMINED IN THE COURT OF
CHANCERY.

1. Annuity—whether for Life or Perpetual—Wills Act (7 Will. 4. & 1 Vict. c. 26. sec. 28). 2. Covenant to settle intended Wife's after-acquired Property. 3. Covenant to settle Wife's after-acquired Property—Legacy to Wife's separate use. 4. Debt—whether by Simple Contract or Specialty. 5. Directors of Railway Company—Powers of over Shares put at their disposal by Shareholders—Chairman of Company must not profit by his fiduciary position—must render Accounts. 6. Election—Dower—Annuity. 7. Eserow. 8. Joint-Stock Company Act, 7 & 8 Vict. c. 110. secs. 25 & 26.—General Liability of Shareholders to Creditors. 9. Married Woman—Separate Estate—General Power of Appointment by Will—Liability to Debts. 10. Married Woman—Separate Estate—6 & 7 Vict. c. 73. s. 37—Taxation of Costs. 11. Mortgagor and Mortgagee—Tender of Sum due—Redemption—Costs. 12. Mortgagor and Mortgagee—Death of Mortgagor without Heirs Intestate—Mortgagee entitled against Claim of Crown by Escheat. 13. Mortgagor and Mortgagee—Disclaimer—Costs. 14. Mortgagor and Mortgagee—Release of Vendor's Covenant for quiet Enjoyment by

Mortgagee. 15. Mortmain — Charity — Establishment of. 16. Power of Partition—does not include Power of Sale. 17. Practice—House of Lords rehearing on Allegation of Fraud. 18. Surety—Release of. 19. Surety—new Securities—whether released by Creditor giving up. 20. Voluntary Trusts. 21. Waste—Active—Permissive—Tenant for Life—Repairs. 22. Will—Construction—Next of Kin — Period of Distribution. 23. Wills Act, 7 Will. 4. & 1 Vict. c. 26. s. 24.

1. NICHOLS v. HAWKES. 10 Hare, 342.

Annuity — Whether for Life or Perpetual — Wills Act, 7 Will. 4. & 1 Vict. c. 26. s. 28.

It has been held by Sir W. P. Wood, V. C., that the 28th section of the Wills Act (7 Will. 4. & 1 Vict. c. 26.), which enacts that “where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of,” applied to the devise of an existing estate or interest, and not to an estate or interest which the testator, by his will, creates *de novo*; and, therefore, a gift by will since the statute of an annuity to a person without words of limitation, but which was by the same will charged upon real estate, is not a devise of a perpetual annuity or rent-charge, and is a gift of an annuity for life only, as it would have been before the statute. See *Kerr v. The Middlesex Hospital*, 2 De G., Mac. & G. 19.; L. R. 186.

2. EX PARTE BLAKE. 16 Beav. 463.

Covenant to settle Intended Wife's after-acquired Property.

There was a covenant in a marriage settlement, that in case at any time “thereafter” during the coverture, any real or personal estate should “descend, come to, or vest in” the wife (then an infant), it should be conveyed, assigned, and assured upon the trusts of the settlement. It was held by Sir J. Romilly, M. R., to include the proceeds of real estate taken by a public company, to which the wife, at the execution of the settlement, was entitled in remainder. His Honour, after referring to *Hoare v. Hornby* (2 Y. & C., C. C. 121.), *Otter v. Melvill* (2 De G. & S. 257.), *Graffey v. Humpage* (1 Beav. 46.), *James v. Durant*, (2 Beav. 177.), said that the case of *Blythe v. Granville* (13 Sim. 190.) was not distinguishable from the case of *Ex parte Blake*, and that the plain and rational meaning of the words “come to” included property of which the possession was to come to the wife during

the coverture, and although the right thereafter to possess it was then vested in the wife. That if the sum of money was to be treated as *personalty*, it was bound by the covenant of the husband, and ought to be transferred to the trustees, on the trusts of the settlement. The Court could not hold the money to be real estate, for the purpose of avoiding the covenant of the husband, and then to treat it as personal estate, for the purpose of avoiding the necessity of the wife taking such steps, with the consent of the husband, as would be necessary for the purpose of obtaining possession of it, if it were, in truth, land.

3. RAMSDEN v. SMITH. 2 Drew. 298.

Covenant to settle Intended Wife's after-acquired Property—Legacy to Wife's separate Use.

In a marriage settlement, it was agreed and declared, and the husband for himself, his heirs, executors, and administrators, covenanted, promised, and agreed with and to the trustees, that if any real or personal estate whatsoever should, during the intended coverture, descend or devolve to or vest in the intended wife, or in any person in trust for her, or to or in the husband in her right, then the husband should make, do, and execute, or cause or procure to be made, done, and executed, or join or concur with the intended wife in making, doing, and executing all such acts, deeds, conveyances, &c., as should be necessary for settling such real and personal estate upon the trusts of the settlement. Afterwards a legacy was left to the wife for her *separate use*. It was *held* by Sir R. T. Kindersley, V. C., that the legacy did not come within the agreement and covenant to settle contained in the settlement. His Honour, after examining the cases of *Douglas v. Congreve* (1 Keen, 410.), and *Thornton v. Bright* (2 My. & Cr. 254.), where Lord Langdale and Lord Cottenham had come to the same conclusion upon somewhat similar cases, distinguished them from the case of *Butcher v. Butcher* (14 Beav. 222.), where, by the clause in the settlement, it was "agreed and declared by and between the parties thereto," and the intended husband "covenanted with the trustees, that in case any personal property should thereafter, during the said intended coverture, come to or vest in the intended wife, or in the intended husband in her right, or by the rights of marriage, the same should be paid, assigned, or transferred by all proper parties, without delay, from time to time," to the trustees, upon the trusts of the settlement. The Master of the Rolls *held* that the wife was as much bound by the covenant as

the husband, upon the ground, as stated by the Vice-Chancellor, that "it was not the covenant of the husband only, and was, moreover, a covenant and agreement, not that the husband alone would do certain acts, but that the property which should come to the wife should be settled;" the learned Vice-Chancellor, after referring to *Ewart v. Ewart* [not reported] before Vice-Chancellor Wood, and *Milford v. Peill* (2 Weekly Reporter, 181.), concluded his judgment with the following observations:—"It appears to me that, looking at the instrument itself, independently of any authorities, the intention of the parties was this,—that inasmuch as any property coming to the wife being personalty, and any property coming to the wife being real property, would, as to the former absolutely, and, as to the latter, in a modified form, become the property of the husband (I mean, as to realty, become vested in the husband during the coverture), the intention was that that property which the husband would have any power over, or with respect to which any act of his might be necessary to vest that property, should by him, and by acts done either by himself or by those whom he had a right to compel to do the acts, be settled; but that it was not intended to settle any separate property. When I look at the authorities, concurring as I do in every one of them, not one of those authorities contravenes the view I have taken; on the contrary, it appears to me the principle established by those cases is the true principle, which, independently of them, I should have arrived at, and which is the very principle on which it is my intention to act in deciding this case."

4. WYNCH v. GRANT. 2 Drew. 312.

Debt — Whether by Simple Contract or Specialty — Trustees.

A deed by which new trustees were appointed, recited that they had agreed to become trustees, and then assigned the trust premises to them to hold on the trusts of the original deed. There was no express agreement or declaration that they would execute the trusts. *Held* by Sir R. T. Kindersley, V. C., upon the authority of *Ady v. Arnold* (18 L. R. 421.), decided by Lord St. Leonards, that a debt created by a breach of the trust was not a specialty debt.

5. THE YORK AND NORTH MIDLAND RAILWAY COMPANY
v. HUDSON. 16 Beav. 485.

Directors of Railway Company—Powers of over Shares put at their Disposal by Shareholders—Chairman of Company must not profit by his Fiduciary Position—Must render Accounts.

By a resolution passed at a General Meeting of a Railway Company, of which the defendant Hudson was chairman, 12,050 shares were to be "at the disposal of the Directors."

Sir J. Romilly, M. R., with regard to the question whether a public meeting of shareholders had power within the scope of the Act of Parliament and the partnership thereby created and incorporated to bind absent persons, or even a minority, in disposing of the funds of the Company, said that that question did not in his opinion arise in this case, but he was anxious that nothing should fall from him to lead to the conclusion, that the Court, consistently with the principles which it administered, could sanction such a proceeding. The duties and powers of the Directors and the shareholders were defined, with reasonable accuracy, in the statutes applicable to the subject; and the proper and becoming mode of proceeding in the case of services as great as could be conceived, and as were there said to have been performed by Mr. Hudson, was that the individual shareholders should from their private funds or shares contribute such sums of money, or give such shares as each might think fit towards creating a gratuity to reward such persons.

With respect to the Directors not making a profit of the shares, his Honour observed:—

"The Directors were not, I think, intended to be made liable in case they had, through an error of judgment, omitted to realise advantages from them which might have been obtained; but they were, in my opinion, bound to be ready, at all times, to explain their conduct in this matter to the shareholders, and, above all, on no principle could they derive to themselves, directly or indirectly, *any personal or pecuniary advantage* from the mode in which they might dispose of these shares."

With respect to part of the shares as to which "it was insinuated in the pleadings and asserted at the Bar," that it had been applied as secret service money, for the purpose of enabling the promoters of the Bill to pass it through Parliament, his Honour observed, "that if practicable, it is a highly improper

application of money or shares, and that the Court will not attend to the suggestion of such a mode of application, as an excuse for not rendering an account. If the defendant has applied the property of the Company in a manner which will not bear the light, and for purposes which cannot, with propriety, be stated even to the shareholders of the Company, and which purposes have not been distinctly sanctioned by them, the defendant must bear the consequences; and if he be charged with the receipt of the money, he cannot discharge himself by suggestions of any such application of any portion of it."

As to the Chairman applying part of the shares in remunerating himself for his services in such capacity, his Honour added: "With regard to a portion of the shares which the defendant alleged that he had applied to his own use, and contended that regard being paid to the services he had performed, and the scanty nature of the salary he received as Chairman, the remuneration to which he had thus helped himself was but a meagre and inadequate return for the advantages he had conferred upon the Company," "It is the duty of every man who accepts any situation to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation, in retaining for his own benefit sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion that his services were worth more than what was paid for them, and that he was himself entitled to ascertain and determine the just measure of their value. If this principle were allowed, I know not what there would be to prevent any clerk from retaining the property of his master, on the plea that his master had not adequately rewarded his great and meritorious services."

WARBUTON V. WARBUTON. 2 Smale & Giff. 163.

Election — Dower — Annuity.

In this case the question arose, whether, on the face of the will, it appeared to be the intention of the testator that his widow should be put to her election between dower, which she was entitled to out of lands devised by him to trustees, and an annuity

which he had given to her out of such lands. The annuity given to the wife was 20*l.* a year; an annuity of the same amount, as also a legacy of 100*l.*, was given by the testator to a stranger. The testator had given to his trustees a power to "*lease, set, and manage*" his real estates. Sir J. Stuart, V. C., *held*, that the widow was not obliged to elect between the annuity and dower; but that she was entitled to both: as he was of opinion that the power of leasing and managing the real estates did not, by itself, raise an implication to exclude his widow from her dower, so as to compel her to elect. His Honour thought *Grayson v. Deakin* (3 De G. & S. 298.), decided by Lord Justice Knight Bruce when Vice-Chancellor, and *Parker v. Sowerby* (1 Drew, 492.), decided by Vice-Chancellor Kindersley,—authorities in favour of election in such a case,—had proceeded upon a misapprehension of the grounds of the decision of the case of *Hall v. Hill* (1 Dru. & War. 102.), which his Honour considered to have been decided mainly on the circumstance that the widow acquired under the will a much larger provision than the value of her dower; and that was held to raise an implication that the testator did not intend that his widow should have both: and that, in his opinion, any case which was founded upon the assumption that the Lord St. Leonards' judgment in *Hall v. Hill* proceeded mainly, if not entirely, upon the existence of the leasing power, was not to be followed as an authority.

It may here be remarked, that Vice-Chancellor Kindersley did not, in deciding the case of *Parker v. Sowerby*, affect to proceed upon the authority of *Hall v. Hill*, but upon the current of authorities. With regard to what Lord St. Leonards meant in *Hall v. Hill*, we may observe that, in the subsequent case of *O'Hara v. Chaine* (1 J. & L. 665.), his Lordship expressly says, "The power of leasing decides this case. . . . The case comes within the principle of *Hall v. Hill*; and I see no reason to depart from that decision." The same proposition is expressly enunciated in *Roadley v. Dixon*, 3 Russ. 192.; *Miall v. Brain*, 4 Madd. 119.; *Taylor v. Taylor*, 1 Y. & C., C.C. 727. The observations of Vice-Chancellor Stuart appear to have led to an appeal in the case of *Parker v. Sowerby* from the decision of Vice-Chancellor Kindersley; and the case was heard before the full Court of Appeal, when their Lordships were unanimously of opinion, that the power of leasing was *inconsistent with the right of the widow to dower by metes and bounds*; and that, therefore, she was bound to elect between the annuity and her dower, and dismissed the appeal with costs. The decision, therefore, of Vice-Chancellor Stuart in

Warbuton v. Warbuton must be considered as overruled. See Art. 18 Jur. 197. referred to in **Parker v. Sowerby** on appeal.

7. **WOOD v. KNOX.** 3 Ir. Ch. Rep. 109.

Escrow.

No form of words is necessary to constitute the delivery of an instrument as an escrow. If the real intention of the parties be, that the instrument shall not operate at all except and until a specified condition be performed, it is an escrow. Therefore, where the renewal of a lease was executed by the lessors on the promise and faith of immediate payment of the renewal fines, and there was no attesting witness to the execution, it was held by Lord Chancellor Blackburne, that the renewal was delivered as an escrow.

8. **IN THE MATTER OF THE SEA FIRE AND LIFE ASSURANCE COMPANY, AND OF THE JOINT-STOCK COMPANIES' WINDING-UP ACTS, 1848 & 1849.—GREENWOOD'S CASE.** 3 De Gex, Mac. & Gord. 459.

Joint Stock Company Act, 7 & 8 Vict. c. 110. ss. 25 & 26.—General Liability of Shareholders to Creditors.

The general liability of partners to creditors is not materially affected by the provisions of the Joint-Stock Companies' Registration Act. When therefore the question arose, whether by a clause in the deed of settlement, the liability of the shareholders to third parties was limited to the amount of their shares,—it was held by the full Court of Appeal, that the creditors of the Company would not, by the operation of the clause and of the Joint-Stock Companies' Registration Act, lose their right to proceed against the shareholders beyond the amount of their shares.

9. **VAUGHAN v. VANDERSTEGEN.** 2 Drew. 165.

Married Woman—Separate Estate—General Power of Appointment by Will—Liability to Debts.

Personal property was settled to the separate use of a married woman for life, she having also a general power of appointment over it by will. It was held by Sir R. T. Kindersley, V. C., that she did not by exercising the power make the property applicable to the payment of her engagements in the nature of debts, viz.

such engagements as would be charges on her separate estate. "No case," said his Honour, "can be found in which the Court has applied the property appointed by the will of a married woman in exercise of a power to the payment of her debts. But a case of *Hughes v. Wells* (9 Hare, 749.) was cited on behalf of the creditors, in which it is suggested that Lord Justice Turner, when Vice-Chancellor, intimated an opinion that the Court might do this. If I found a deliberate opinion to that effect expressed by that learned judge, it would make me very much mistrust the soundness of my own conclusions. But, upon examination of that case, it appears to me that the passage in the Vice-Chancellor's judgment in which the language occurs which is supposed to express such an opinion, is addressed entirely to the question, how far the property of a married woman may be affected by her acts and conduct in participating in breaches of trust relating to that property; and even upon that question he abstains from expressing any decided opinion; and while discussing it, he merely glances incidentally, and in passing, at the idea that possibly, property appointed by her will might be liable to her engagements. But the question did not arise for his consideration. I think it would be doing an injustice to the learned judge to regard that case as an authority in favour of the claim of the creditors."

10. *WAUGH V. WADDELL.* 16 Beav. 521.

Married Woman—Separate Estate—6 & 7 Vict. c. 73. s. 37.—Taxation of Costs.

In this case it was *held* by Sir J. Romilly, M. R., that a married woman having separate estate, and employing a solicitor, is "a party chargeable" within the meaning of 6 & 7 Vict. c. 73. s. 37., for although not *personally* liable, her *separate estate* is liable. His Honour also *held* that, pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate.

11. *HARMER V. PRIESTLY.* 16 Beav. 569.

Mortgagor and Mortgagee—Tender of Sum due—Redemption—Costs.

Although a mortgagee is favourably looked on by the Court of Chancery, he will not be allowed, by disputing the account, to throw the expenses of unnecessary litigation upon the mort-

gagor. Where therefore a mortgagor made an unconditional tender of a sum for principal, interest, and costs to the mortgagee, who refused to accept it, it was *held* by Sir J. Romilly, M.R., that if the amount tendered was all that was due, the mortgagee ought to bear the costs of a subsequent suit for redemption. (See *Rhodes v. Buckland*, 20 L. R. 177.)

12. BEALE V. SYMONDS. 16 Beav. 406.

Mortgagor and Mortgagee — Death of Mortgagor without Heirs Intestate — Mortgagee entitled against Claim of Crown by Escheat.

A mortgagor died in the year 1831, intestate and without heirs. *Held* by Sir J. Romilly, M.R., that although the title of the mortgagee was good as against the Crown, which could not claim by escheat, nevertheless as the mortgagee held the property, subject to the debts of the mortgagor, he could not make a good title in 1852. "Whether," said his Honour, "trust estates could escheat to the Crown was originally a question of great nicety, and it was determined, after great care and a most elaborate investigation and argument, in the well-known case of *Burgess v. Wheate* (1 Edm 177., 1 W. Black. 123.), and unless that decision can be in principle distinguished from this, or unless it has been shaken by subsequent authorities, it must, in my opinion, govern this case. That was the case of a *trust*, and *not* of an *equity of redemption*, but I can discover no ground on which an equity of redemption should be held to escheat to the Crown, which would not apply equally to the case of a mere trust. The principle I apprehend to be, that neither the Crown nor the lord can enter or seize where there is a legal tenant in possession; the right to the service of the tenant in possession being all that the Crown or the lord can of right require. Although many cases to which I was referred point out distinctions between a mere trust estate and an equity of redemption, yet, so far as regards the right of the Crown or the lord which may accrue by escheat, the strict analogy between them is acknowledged by all the three eminent judges who delivered their opinions in that case, who agreed in this respect, although they differed in their final conclusion. And Sir T. Clarke, M. R., and Lord Henley (then Lord Keeper), differing in this respect from Lord Mansfield, distinctly express their opinion, that in such a case there would be no escheat to the Crown.

After referring to *Taylor v. Haygarth* (14 Sim. 16.), and

Davall v. New River Company (3 De G. & Sm. 394.), his Honour adds, "the only case which appears to me to militate against the decision in *Burgess v. Wheate* is the case of *Viscount Downe v. Morris* (3 Hare, 394.); and upon the most careful consideration of that case, it appears to me, that, if followed, it would affect or qualify the decision in *Burgess v. Wheate*, *unless* it be considered as meant merely to establish the following proposition, which however would appear to me to be new, viz., that if a term of years is vested in a termor, and, subject to that term, the reversion in fee is vested in another, if the termor should mortgage his term and die without heir and next of kin, then that in every such case, the reversioner of the fee would be entitled to redeem the mortgage of the term. It is, however, to be observed, that the Vice-Chancellor (Sir James Wigram) in deciding that case, expressly admits the authority of *Burgess v. Wheate*, and considers that that case did not, in any degree, affect or touch the case then before him. I am therefore of opinion, that the case of *Burgess v. Wheate* is not only not touched, but that it is confirmed by the subsequent decisions; that it governs this case, and that consequently there was no escheat to the Crown, and that no difficulty in respect of any claim in that quarter can arise to invalidate the title of the testator."

13. *FORD v. THE EARL OF CHESTERFIELD.* 16 Beav. 516.

Mortgagor and Mortgagee — Disclaimer — Costs.

In this case, where the right of a disclaiming defendant to costs in foreclosure suits was much discussed, the following important observations were made by Sir J. Romilly, M.R.: "The result is that, in my opinion, the effect of all the later authorities is this:—*First*, that in a suit for foreclosure or redemption of mortgages, where a defendant disclaims in such a manner as to show that he never had and never claimed an interest, at or after the filing of the bill, then he is entitled to his costs. *Secondly*, if a defendant, having an interest, shows that he disclaimed or offered to disclaim before the institution of the suit, there, also, he is entitled to his costs. *Thirdly*, that where a defendant, having an interest, allows himself to be made a party to a suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, in that case he is not entitled to his costs. All the modern authorities are consistent with these rules, and are reconcilable with each other, except the late case of *Gurney v. Jackson* (1 Sm. & G. 97.), the

facts and circumstances of which are not stated fully in the report of it cited; and I am of opinion that that case does not overrule the general current of authorities."

14. THORNTON v. COURT. 3 De Gex, Mac. & Gord. 293.

Mortgagor and Mortgagee — Release of Vendor's Covenant for Quiet Enjoyment by Mortgagee.

A mortgagee cannot effectually, in equity, without the concurrence of the mortgagor, release a vendor, from whom the mortgagor purchased, from his covenant for quiet enjoyment. Where, therefore, a vendor conveyed an estate (with a covenant for quiet enjoyment) to a person who afterwards mortgaged it, and upon the mortgagor being evicted, the vendor, without the concurrence of the mortgagee, paid to the mortgagee a sum of money in discharge of the covenant, it was held by the Lords Justices, that the transaction was not binding on the mortgagor; and the vendor was, upon a bill filed by the mortgagor, restrained from setting up the conveyance to the mortgagee, or the accord between the vendor and mortgagee as a defence to an action by the mortgagor as purchaser on the covenant for quiet enjoyment.

15. *Re CLANCY.* 16 Beav. 294.

Mortmain — Charity — Establishment of.

In this case, where there was a bequest of a sum of stock to be applied "*for the establishment* of a charity school in Reading," it was held by Sir J. Romilly, M. R., that the gift was void, on the ground that it pointed to a permanent establishment of a charity, for which purpose it was necessary to bring land into mortmain. "I have laid down the rule (see *Trye v. Corporation of Gloucester*, 14 Beav. 173.), that any bequest tending to bring fresh land into mortmain is void; and the Vice-Chancellor Kindersley, in *Longstaff v. Renison* (1 Drew. 28.), expressly states, that *if it would be a due execution of a trust to buy land for the purpose of erecting a school, the gift is void*. The question is, whether this case does not fall within the rule. The testator directs the school to be "established;" he therefore points to a permanent establishment; and how can this be effected without a school, which must stand on land to be procured for the purpose?" See, however, *The Mayor, &c. of Eaversham v. Ryder*, 18 Jur. 587.

16. BRASSEY V. CHAMBERS. 16 Beav. 223.

Power of Partition—Does not include Power of Sale.

Sir J. Romilly, M. R., decided in this case that a power to trustees "to sell and dispose of property at their discretion," did not include a power of partition before sale, in order to enable them to sell in such a manner as might be beneficial to the *cestuique trust*. "I consider," said his Honour, "the clear effect of *M'Queen v. Farquhar* (11 Ves. 467.) to be this, viz., that if *Abel v. Heathcote* (12 Ves. Jun. 98.), decided by Lord Loughborough, should be thought to sanction the doctrine either that a power of exchange or a power of sale, expressed in ordinary terms, authorises partition, that doctrine is not to be supported, and that it is, in truth, overruled by and is inconsistent with the decision of *M'Queen v. Farquhar*."

17. *Ex parte* JAMES WHITE, AND OTHERS.—*In re* HENRY TOMMEY V. WHITE. 4 H. L. Cas. 313.

Practice—House of Lords—Rehearing on Allegation of Fraud.

A judgment of the House of Lords, given on an appeal, cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the House will afterwards discharge the order granting the leave to appeal and the order constituting the judgment thereon.

18. JENKINS V. ROBERTSON. 2 Drew. 351.

Surety—Release of.

S. the principal debtor, with R. his surety, were indebted to N. upon a bond. R. died, and N. obtained a decree to administer his estate in a creditor's suit. After the decree N. brought an action against S., the principal debtor, and took a judgment, by arrangement, for payment by instalments, without the assent of, or any communication with, those interested in the estate of R. It was held by Sir R. T. Kindersley, V. C., that the surety was not thereby discharged. "I do not," said his Honour, "in any degree doubt that, as a general rule, the creditor, by giving time to the principal debtor, discharges the surety; but that is not this case. This is a case in which there is a creditor, who has by the decree in the suit established his right against the surety. If he had brought

an action against the principal debtor before the decree, and taken, as has been done here, a judgment by arrangement, giving time, no doubt the surety would be discharged. But the creditor, having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and the *subsequent* dealing with the principal debtor does not operate to discharge the surety from a liability under which he is no longer as *surety*, but under the decree."

With reference to this decision we may observe, that it is difficult to see upon what principle the fact of the arrangement being *after* the decree, had not the effect of releasing the surety, when had it been made *before*, according to the learned Vice-Chancellor's admission, it would have had such effect?

19. NEWTON V. CHORLTON. 2 Drew. 333.

Surety — New Securities — Whether released by Creditor giving up.

A creditor whose debt was secured by the bond of the principal debtor and a surety, took, *after* the date of the transaction, further security from the principal debtor, and afterwards gave up that further security. It was *held* by Vice-Chancellor Wood, that the surety was not thereby discharged. His Honour considered that Lord Rosslyn, in the case of *Rees v. Berrington* (2 Ves. Jun. 543.), laid down the law too broadly when he stated, "that there shall be no transaction with the principal debtor without acquainting the person who has most interest in it (*i. e.* the surety). The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own), without consulting him." His Honour considered that the proposition of Lord Rosslyn ought to be confined to the *original* contract."

None, however, of the cases cited by Vice-Chancellor Wood appear to impugn the principles laid down by Lord Rosslyn, although the circumstances under which such cases were brought before the Court did not render the application of those principles necessary to their full extent. Moreover, as a surety is entitled to the benefit of any additional securities which the creditor has taken from the principal debtor, and may possibly refrain from taking proceedings to compel the principal debtor to pay the debt, by

relying upon such securities, it seems but reasonable to consider, that the taking of such additional securities should, although not part of the *original* contract, be considered so intimately connected with it, as to render any parting with them, without the consent of a surety, as releasing him from the obligations he had incurred in that capacity.

20. *BRIDGE v. BRIDGE.* 16 Beav. 315.

Voluntary Trusts.

It is by no means easy to solve the question, what constitutes a valid voluntary trust? and the recent decisions of *Kekewich v. Manning* (1 De Gex, Mac. & Gord. 176.) and *Voyle v. Hughes* (20 L. R. 187.) seem scarcely to have settled the law upon this subject.

In *Bridge v. Bridge*, the plaintiff being entitled to shares in various companies, foreign bonds, consols, cash, and real estate, which were vested in the trustees of his uncle's will, executed a voluntary deed, whereby he granted the realty to J. B. and A. G., to the use of himself and J. B. and A. G., upon trust to sell; and he directed that the produce, and the personal estate and effects before-mentioned should thenceforth be and be considered vested in him and J. B. and A. G., upon the trusts therein mentioned in favour of volunteers. The trustees of the uncle's will did not accept the trusts, but some of the shares and the bonds were actually transferred to the settlor and J. B. and A. G. It was held by Sir J. Romilly, M. R., upon a bill filed by the settlor, that the deed was valid as to the shares and bonds which had been transferred to the plaintiff and J. B. and A. G., but ineffectual as to foreign bonds, stock, and cash, of which there had been no transfer, and no acceptance of the trust by the trustees of his uncle's will, in whom they were vested; and ineffectual also as to the realty, the legal estate not having passed. See also *M'Donnell v. Hesilrige*, 16 Beav. 346.

21. *POWYS v. BLAGRAVE.* 1 Kay, 495.

Waste — Active — Permissive — Tenant for Life — Repairs.

Sir P. Wood, V. C., in the above-mentioned case said, "that, with certain excepted cases, it is the settled doctrine of the Court of Chancery, that there are no means of interfering with permissive

waste;" and *held* that a trustee to whom real property was devised in trust for a person for life, could not interfere with the possession of the equitable tenant for life, because he neglected to keep the property in repair; but that if the tenant for life was committing *active* waste, the trustee might, and probably ought, to interfere, at least if the persons entitled in remainder were under disability. A trustee was, therefore, not liable to the remainderman for the neglect of a tenant for life to repair. "I think," said his Honour, "that it is not possible to obtain a remedy against *permissive* waste indirectly, through the medium of a trust created in the property. If I were to hold that, it would be most inconvenient. If every trustee is to be considered liable, though merely a trustee under a will which devises the property to and to his use, as in *Denton v. Denton* (7 Beav. 388.), in cases of permissive waste for want of repairs, the difficulty which is now felt of getting respectable persons to act as trustees would be increased. I can foresee no end to the demands which would be made upon trustees by remaindermen coming into possession of the trust property, who might think it not sufficiently repaired, if they might say to the trustees, 'it was your duty to look after the tenant for life, you had the legal estate, and it was your business to see that he was performing all those trusts; and as you have not done so, we shall fix you with the liability.' I think that such a doctrine cannot possibly be established."

22. CABLE V. CABLE. 16 Beav. 507.

Will—Construction—Next of Kin—Period of Distribution.

In the above-mentioned case, the rule laid down 20 L. R. 192. (see *In the Matter of the Trusts of the Will of Daniel Barber*, 36.) as to the period for distribution amongst the next of kin has been again acted upon. The facts are as follows:—A testator bequeathed the residue to his wife for life, with remainder to his children living at his death; and if there should be none (which event happened), then he directed, "that immediately after his wife's decease, it should become the property of the person who should *then* become entitled to take out administration to his effects as his personal representative," according to the Statute of Distributions, and in the proportions thereby pointed out, in case he had died intestate and unmarried. It was *held* by Sir J. Romilly, M. R., that the next of kin *at the death of the testator*, and not those at the death of the tenant for life, were entitled.

23. DOUGLAS V. DOUGLAS. 1 Kay, 400.

Wills Act, 7 Will. 4 & 1 Vict. c. 26. s. 24.

A question, occasionally arises how far the 24th section of the New Wills Act (7 Will. 4. & 1 Vict. c. 26.), which directs "that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will" is to be considered as applicable to those gifts of personal property, which, before the Act, would have been specific legacies. In the above-mentioned case, Sir W. P. Wood, V C., observed that there was a considerable class of cases in which gifts of personalty were held to be specific; and which, since the new statute, might possibly include portions of the property which would not have passed except by its operation; in particular those cases in which a testator bequeaths the whole of some one genus of his property, as, for instance, all debts due to him on bond or simple contract. After referring to *Doe d. York v. Walker* (12 M. & W. 591.), *Cole v. Scott* (1 Mac. & G. 518.), his Honour adds, "I can imagine that, under the new statute, a gift of 'all my stock' would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of 'all my stock which I have purchased,' that would make a considerable difference, and would, I think, be enough on the face of the will to show that the testator was defining the particular portion of the property which he intended to give, as being property then in his possession; so, if the gift were of 'all the debts due to me on judgments' it is possible that judgments obtained after the date of the will would pass; but if it were 'all judgments which I have registered,' that would be taking a particular class of judgments out of the general class, and would show that the testator did not intend his will to have the sweeping operation of passing all judgment debts registered by the testator at the time of his death."

II. POINTS DETERMINED IN THE COURTS OF COMMON LAW.

(By ALEXANDER PULLING, Esq., Barrister-at-Law.)

REPORTERS.

Queen's Bench	-	-	-	{ 2 Ellis & Bl. Part 4. 3 Ellis & Bl. Part 1.
Common Pleas	-	-	-	{ 12 Common Bench. Part 4. 13 Common Bench. Parts 2, 3, 4.
Exchequer	-	-	-	- 9 Exchequer. Part 4.

1. Attorney—Obligation to produce Client's Title Deeds in Evidence. 2. Retainer of Attorney at an Annual Salary—Operation of Agreement. 3. Bill of Exchange—Admission of Acceptance—Production of Bills. 4. County Bridge—Action against County Surveyor for Injury caused by want of repair. 5. County Court—Appeal from in what cases. 6. Delivery Order—Presentation of—What it means. 7. Feme covert, where Action maintainable by, in her own name. 8. Joint Stock Company—What is a Contract within the provisions of 7 & 8 Vict. c. 110. s. 44. 9. Lex Loci Contractus—Contract made in France in contravention of Statute of Frauds not enforceable here. 10. Libel—Privileged Communication—Evidence of Malice—Right of Jury to look at Libel. 11. Negligence—Master and Servant—Pleading in Action. 12. Railway Co. Carriers—Small Parcels—Uniform Charges. 13. Statute—Construction of—City of London Small Debts Act—Costs. 14. Witness—Privilege from answering Questions tending to Criminate.

1. VOLANT v. SOYER and Another. 13 Common Bench, 231.

Attorney—Obligation to produce Client's Title-Deeds in Evidence.

This was an action tried before Jervis, C. J., at the Middlesex Sittings after Michaelmas Term, 1852. It appeared upon the trial of the cause that the two defendants had been in partnership in carrying on the Symposium at Gore House, Kensington, where the work for which the action was brought had been done. On the part of the defendant Symons, one Mr. Michael had been subpoenaed to produce a deed of assignment dated the 22nd of November, 1851, by which both defendants were alleged to have assigned all their property at the Symposium to one Hart, in trust for their creditors, and in trust to pay over the surplus, if any, to themselves, and by which deed Hart was alleged to have undertaken to satisfy all existing claims against the defendant's estate

and to pay all necessary expenses. The deed had been prepared in the office of Mr. Michael, who was the attorney for Mr. Hart, and held the deed in that character. Mr. Michael stated that, shortly after the execution of the deed, a document was delivered from his office to the defendants as a copy, but he was unable, from his own knowledge, to prove it to be a copy. Mr. Michael, on being asked to produce the deed, submitted to the Judge that he held it as attorney for Mr. Hart, and was not bound to produce it. He was asked whether the deed was not an assignment to Hart, but the Judge refused to allow the question. The copy of the deed was then tendered as secondary evidence, on the ground that in the delivery as a copy there was a declaration accompanying an act, and that this, along with the other circumstances of the case, made the copy admissible. The Judge also refused this evidence, and directed the Jury to find for the plaintiff. On motion for a rule to set aside the verdict, and for a new trial, on the ground of improper rejection of evidence, it was held by the Court of Common Pleas, upon the authority of *Newton v. Chaplin* (19 L. J., C. P. 374.), and *Doe d. Carter v. James* (2 Moo. & R. 47.), that an attorney subpoenaed to produce a deed, may, in his discretion, not only refuse to produce it on the ground that it is his client's, but may also refuse to answer a question with respect to its nature; and the Judge ought not to examine it to see whether it is a document which ought to be withheld. It was held, also, that the copy of the deed was not admissible as secondary evidence of its contents.

2. *EMMENS v. ELDERTON.* 13 Com. B. 495.

Retainer of Attorney at an Annual Salary— Operation of Agreement.

The declaration set out a parol agreement between Elderton and the Church of England Insurance Co., that Elderton should, as the attorney and solicitor of the Company, receive a salary of 100*l.* per annum in lieu of costs for general business transacted for the company, and should and would for such salary advise and act for the Company on all occasions in all matters connected with the Company, with certain exceptions, and alleged in the usual form mutual promises, and a breach by the Company in dismissing him. It was held by the House of Lords, in accordance with the opinion of eight Judges against one, and in affirmance of the judgment of the Exchequer Chamber, whereby that of the Court of Common Pleas was reversed, that the count was good after verdict, for that

it sufficiently alleged an agreement by the Company creating the relation of attorney and client, and a promise to continue that relation for at least a year.

3. CHAPLIN v. LEVY. 9 Exch. 531.

Bill of Exchange — Admission of Acceptance — Production of Bill.

In an action on a bill of exchange against the acceptor, to which the defendant pleaded *non acceptavit*, the plaintiff gave in evidence the following letter, signed by the defendant's attorney: — "I hereby admit that the acceptance to the bill of exchange upon which this action is brought is in the handwriting of the defendant." The Court of Exchequer held that this was evidence to go to the jury of the defendant's acceptance without the production of the bill itself, and that the plaintiff was entitled to retain the verdict found for him for the amount of the bill, without interest.

4. M'KINNON v. PENSON. 9 Exch. 609.

County Bridge — Action against County Surveyor for Injury caused by want of Repair.

In this case it was held in the Exchequer Chamber (affirming the decision of the Court of Exchequer), that an action for a personal and peculiar damage resulting from the want of proper repair to a county bridge will not lie against the county surveyor, either at common law or under the statute 43 Geo. 3. c. 59.

5. DRESSMAN v. HARRIS. 9 Exch. 485.

County Court — Appeal from in what Cases.

In this case the Court of Exchequer held that in actions brought in the County Courts in cases where those courts have jurisdiction, an appeal lies where the amount of the claim exceeds 20*l.*, although judgment be given for a smaller amount.

6. BARTLETT v. HOLMES. 13 Common Bench, 630.

Delivery Order — Presentation of, what it means.

This was an action on a contract to sell iron specified in a certain delivery order signed by the iron-masters, and in the

following form: "We hold at your disposal 1000 tons of grey forged pig-iron, and which we engage to deliver to your order free of all charge, into boats on the *presentation of this document duly indorsed by you*," which order was transferred to the plaintiff, the purchaser; but the iron-masters refused to deliver the iron unless the order was left with them previously.

The Court of Exchequer held that "presentation" meant "delivering up" the document to the iron-masters, and that the plaintiff could not recover.

7. ANN DALTON v. THE MIDLAND COUNTIES RAILWAY.
13 Common Bench, 474. .

Feme Covert, where Action maintainable by in her own name.

The plaintiff in this case, a married woman, bought with moneys partly earned by her before, and partly during coverture, railway stock in her own name, and was registered as the proprietor thereof. Held, that inasmuch as she might be joined with her husband in an action against the Company for dividends due upon the stock, she might (subject to be met by a plea in abatement) maintain an action for the same in her own name.

9. THE BRITISH EMPIRE MUTUAL LIFE ASSURANCE
COMPANY v. BROWNE. 12 Common Bench, 723.

Joint Stock Company—What is a Contract within the Provisions of 7 & 8 Vict. c. 110. s. 44.

This was a case in which the plaintiffs being duly and completely registered and incorporated according to 7 & 8 Vict. c. 110. sought to recover from W. Browne, the defendant, the several sums of 82*l.* 5*s.* 6*d.*, and 5*l.* 10*s.* 8*d.* under the following circumstances:—The declaration set out a certain indenture then made between one W. Loder and Elizabeth Dring his wife of the first part, the defendant of the second part, the plaintiffs of the third part, and Richard Cartwright Lothers, trustees of the company of the fourth part, whereby it was agreed that the plaintiffs should advance to the said W. Loder the sum of 200*l.* on the consideration of his granting them an annuity of 82*l.* 5*s.* during the term of three years, if the several persons thereafter in that behalf named, or the survivor of them, should so long live, the said annuity to be paid on the 1st of February in each year of the

said term, without any deduction thereout, and also in consideration that the said W. Loder, his heirs, executors, or administrators, should and would, until the whole of the said annuity and all arrears thereof, and all costs and charges incident thereto, should be fully paid and satisfied, keep on foot the several policies of assurance which the said W. Loder had effected with the plaintiffs on the lives of himself and his said wife for 200*l.* each, dated the 4th day of February, 1851. The declaration then alleged that on the 21st January, 1852, the premium upon the policy on the life of the said W. Loder, amounting to the sum of 5*l.* 10*s.* 8*d.*, became due and unpaid, on the 1st February, 1852, the said annuity of 82*l.* 5*s.* 6*d.* also became due and unpaid, contrary to the terms of the agreement, upon which this action was brought.

The defendant cravedoyer of the deed, which was set out at length, and then pleaded the 7 & 8 Vict. c. 110. s. 44. Upon special demurrer for that the indenture is not a contract within the meaning of the enactment of the statute referred to in the plea, it was held by the Court of Common Pleas, that a contract entered into "on behalf of" a joint-stock Company within the 7 & 8 Vict. c. 110. s. 44., means a contract by which the Company contracts to do something, and that that section does not prevent the Company from enforcing against third parties a contract which is unilateral only, and which (though they are expressed to be parties to it) has not been executed by the Company.

9. LEROUX v. BROWN. 12 Common Bench, 801.

Lex Loci Contractus—Contract made in France in contravention of Statute of Frauds not enforceable here.

This was an action brought by the plaintiff against the defendant for breach of an agreement. The cause was tried before Talfourd, J., at the second sittings in Middlesex, in Trinity Term, 1852, and it appeared that an oral agreement had been entered into at Calais between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100*l.* per annum, to collect poultry and eggs in that neighbourhood, and send them to the defendant here; the employment to commence at a future day, and to continue for one year certain. It was proved on the part of the plaintiff that, by the law of France, such an agreement is valid although not in writing. For the defendant it was con-

tended that although the contract was made in France, when it was sought to enforce it in this country, it must be dealt with according to our law, and being a contract not to be performed within a year, the Statute of Frauds (29 Car. 2. c. 3. s. 4.) required it to be in writing. Upon motion to enter a verdict for the defendant upon the first issue according to leave reserved by the learned Judge, the Court of Common Pleas held that an action will not lie in the courts of this country to enforce an oral agreement made in France (and valid there), which if made here could not by reason of the Statute of Frauds have been sued upon.

10. GILPIN v. FOWLER. 9 Exch. 615.

Libel—Privileged Communication—Evidence of Malice—Right of Jury to look at Libel.

The plaintiff was master of a "national school" in the parish of C., of which the defendant was rector, and also one of the managers of the school. The defendant requested the plaintiff to teach a Sunday school in connection with the national school, which he declined on account of the increased labour, and was in consequence dismissed. The plaintiff being about to set up a school on his own account in the same parish, the defendant wrote and distributed in that and the adjoining parish a pastoral letter, in which he denounced the plaintiff's conduct as *unchristian-like*, and warned his parishioners against affording any countenance to the projected school either by subscriptions or by sending their children to it. The Judge at the trial having ruled that this letter was a privileged communication, and that there being no evidence of express malice, the defendant was entitled to a verdict, *Held* in the Exchequer Chamber on a bill of exceptions to the above ruling, that the communication was not privileged, and that there was evidence for the jury of express malice; also, that in determining the question of malice, the jury ought to look at the libel itself.

11. MITCHELL ET UX. v. CRASSWELLER AND ANOTHER.
13 C. B. 237.

Negligence—Master and Servant—Pleadings in Action.

The declaration in this case stated "that the defendants were possessed of a certain cart and horse, which was being drawn by and under the care and direction of the defendants' servant, and that whilst the plaintiff's wife was crossing a certain street, the

defendants, by their servant, so negligently and improperly drove and directed the said cart and horse along the said street, that the said cart and horse ran against the plaintiff's wife with great violence and threw her down, and the wheel of the said cart passed over her, by reason whereof the said last-mentioned plaintiff was very much hurt, &c."

The second count was similar, except that it concluded with a statement of special damage to the plaintiff, Richard Mitchell.

The pleas were, 1st, not guilty; 2nd, not possessed. A third plea was added at Nisi Prius, by leave of the Judge, that at the time when the injury was sustained by the plaintiff's wife, the horse and cart were not being used in the defendants' employ, but were improperly used by the persons driving themselves, for other and different purposes. It appeared upon the trial that the defendants, who were ironmongers in Welbeck Street, kept a cart for the purposes of their business, and that it was the duty of their carman, after delivering their goods during the day, to return at night to Welbeck Street, and get the keys of the stable from the defendants' house, and put up the horse and cart in a mews 500 yards distant. Upon the evening in question, after getting the key, he was requested by the defendants' foreman to drive him part of his way home, upon which he went to ask his masters' leave, and, not being able to find them, said "that he would chance it," and then drove the foreman as far as Euston Square, and as he was coming back he drove over the plaintiff's wife. It was contended, at the trial, that the defendants could not, under the first or second plea, show that the carman was not acting at the time of the accident as their servant. The Judge thereupon permitted the third plea to be added under the 222nd section of the 15 & 16 Vict. c. 76. Upon motion, according to leave reserved, to enter the verdict for plaintiff on the ground that the defence raised by the third plea was not admissible under the original pleadings, and that the Judge had no power to allow the third plea,—secondly, that the defendants were liable for the negligence of their servants. The Court of Common Pleas held that the defendants are not liable; also, that the allegation in the declaration "that the defendants were possessed of a cart and horse, which was being driven by their servant," without stating "at the time of the grievance complained of," was immaterial, and not traversable. Held, also, that the defendants, under the plea of not guilty, might show that the driver was not, at that time, acting as their servant.

Cresswell, J. remarked: "I do not say that the Lord Chief Justice was wrong in allowing the third plea to be added, but I should wish for further time to consider the matter before deciding what construction is to be put upon the 222nd section."

12. *CROUCH v. GREAT NORTHERN RAILWAY CO.* 9 Exch. 556.

Railway Co. Carriers — Small Parcels — Uniform Charges.

In this case the much litigated question of the right of railway companies to make extra charges to carriers sending packages containing small parcels came before the Court of Exchequer. The Court of Common Pleas, in the case of *Parker v. Great Western Railway Co.*, 11 Com. B. 545., and *Edwards v. Great Western Railway Co.*, *ibid*, 588., had already decided that, on the construction of the Great Western Railway Co.'s Acts, no difference could be made by a railway Company in the charges to be made to the public, whether the party using the railway were a carrier or not. The Court of Exchequer now decided on the construction of the special Act regulating the Great Northern Railway Co., by which the Company were empowered to charge for the carriage of small parcels any sum which they might think fit, taken together with the 8 & 9 Vict. c. 20., which is incorporated with the special Act, and which empowers the company to vary the tolls, "provided such tolls be at all times charged equally to all persons," that the Company were bound to charge the public alike; and therefore that the fact of a party using their line being a common carrier, did not justify the Company in charging him more than the rest of the public.

13. *CASTRIQUE v. PAGE.* 13 Common Bench, 458.

Statute — Construction of — City of London Small Debts Act — Costs.

In this action the plaintiff recovered a verdict for 27l. 12s. against the defendant as indorsee of a bill of exchange, the defendant being at the time of the commencement of the action liable to be sued in the City of London Small Debts Court. Upon motion to enter a suggestion to deprive the plaintiff of costs under the 119th section of the statute regulating that Court (15 & 16 Vict. c. lxxvii.) it was held by the Court of Common Pleas, notwithstanding the case of the *Attorney-General v. the Governor of Chelsea Waterworks*, Fitzg. 195. and *Ex parte Carruthers*,

9 East, 44., that in the construction of this statute, the 119th section, which is nearly *in totidem verbis* with the 9 & 10 Vict. c. 95. s. 128., is not affected by the 120th section, which is substantially the same with the 13 & 14 Vict. c. 61., whereby the 9 & 10 Vict. c. 95. s. 128. is repealed, and the Court held, therefore, that where a plaintiff in the superior court recovers less than 20*l.* in an action on contract, or less than 5*l.* in an action on tort, which might have been brought in the City Court, he loses his costs without any suggestion; and if he recovers 20*l.*, and not more than 50*l.* in an action on contract (except in certain specified actions), he is not entitled to costs if the defendant enters a suggestion.

"If," said the Lord Chief Justice, "we were at liberty to speculate as to what would be most conducive to the benefit of the public, and as to the reasons which induced the Legislature to enact as they have done, instead of endeavouring to put a construction upon the words, we find much might be said in favour of the view which has been presented by Mr. Pulling, because one cannot well see why a different rule should prevail in the city of London from that which applies to all other parts of the kingdom. When one sees that this statute was consequent upon those which were passed for the general improvement in the administration of the law, one would not have expected that those who had charge of the bill in its progress through the Houses of Parliament, would have committed so palpable a fraud upon the Legislature. But so it is; and this Act differs in a very important particular from the general County Court Acts. If the two provisions in question had been found in two separate Acts of Parliament, applying what Mr. Justice Burton calls the golden rule of construction—to give all the words of an Act of Parliament their plain and ordinary meaning, unless such a construction leads to absurdity or injustice—we might possibly have so altered the words as to avoid the absurdity and incongruity we find here. But, seeing that there are two sections in the same Act of Parliament, immediately following each other, which, though apparently conflicting, received the Royal Assent at the same moment, we are bound, if it be possible, to give effect to both."

14. FISHER V. RONALDS. 12 Common Bench, 762.

Witness—Privilege from answering Questions tending to Criminate.

This was an action of assumpsit upon a bill of exchange for 245*l.*, drawn by one Chappell upon and accepted by the defendant, and

indorsed by Chappell to the plaintiff. The cause was tried before Cresswell, J., at the Second Sittings in London in Michaelmas Term, 1852, when it appeared that the defendant was an officer of the 77th Regiment, stationed at Plymouth; that, during the Plymouth races in August, 1851, certain persons, calling themselves "The Bath and Bristol Club," of whom Chappell was one, went down to Plymouth; that a room was hired for them there at the house of one John Hix, a livery-stable keeper, where roulette was played, and Ronalds, the defendant, was a considerable loser. The defence was, that the bill in question was given by defendant for part of the money so lost by him to Chappell. To prove this, Hix was called, who stated, among other things, that he was in the room on the night on which the defendant was there; but that he saw no gaming. He was then asked, "Was there a roulette-table in the room?" Upon the suggestion of the plaintiff's counsel, the learned Judge, after looking at the Gaming and Wager Act (8 & 9 Vict. c. 109. ss. 1, 2.), told the witness that he was not bound to answer the question, inasmuch as he might thereby involve himself in the danger of being indicted as the keeper of a common gambling-house, or as a conspirator to defraud. Upon motion for a new trial, on the ground that the Judge ought not to have told the witness that he might decline answering the question, the Court of Common Pleas *held*, that a witness is not bound to answer a question where his answer might have a tendency to involve him in a criminal charge, and that the Judge may caution a witness without waiting for him to claim his privilege. "The tendency of the question," said Lord Chief Justice Jervis, "is plain; and the learned Judge saw that the witness really believed that his answer might tend to criminate him. In Phillips on Evidence, 10th edit., vol. ii. p. 487., it is said that a witness is privileged from answering not only what will criminate him directly, but also whatever has a tendency to criminate him: and the reason given for this decisively disposes of this case;"—"because, otherwise, question might be put after question; and, though no single question may be asked which directly criminales, yet enough might be got from him by successive questions whereon to found against him a criminal charge." "We must, therefore, allow the witness to judge for himself, or he would be made to criminate himself entirely."

POSTSCRIPT.

IRISH MEMBERS' CORRUPTION COMMITTEE.

OUR readers will readily perceive that we do not broach the subject of this strange inquiry lately undertaken by the House of Commons, with any reference to the merits of the case, but only from its connection with the rules of Evidence and Procedure. Indeed, the result of the Committee's protracted labours was to prove that the whole of the charges brought, and the whole assertions made, some vaguely, others more specifically, but all hardily and even audaciously, were without the shadow of any thing that could be called proof, and, for the most part, probably without the shadow of foundation. But the manner in which the inquiry was conducted, demands some notice from those who regard the incalculable importance of the principles whereon the rules of evidence are grounded — rules which should guide the proceedings of all courts, and which ought never to be neglected by any body entrusted with the investigation of truth.

As it might be supposed that we disapprove of the course taken in the Committee, on account of the violence to these rules done at each step, we must premise that there are two kinds of inquiry,—one for ascertaining what judicial resolution shall be come to, the other only for the purpose of ascertaining whether there shall be a judicial proceeding or not. Thus suppose an offence is alleged to have been committed, and some one is charged as the offender, that allegation and that charge must be investigated by the strict rules of evidence, of which the most inflexible, as the most important is, the absolute exclusion of hearsay evidence, the permitting no one to state any the least matter not within his own knowledge. But if the inquiry is rather a *Police* than a *Judicial* one, the inquiry not only whether or not the offence has been committed, and whether or not the person charged is

the offender, but also who is the offender, if the accused be not he, or who is the offender, if no one be accused, then a much greater latitude is allowed, and every thing is receivable, which can put the inquirer upon the traces to discover the offender. We have no manner of doubt that the chairman of the Irish Committee was aware of this distinction. A person who has been engaged in administering criminal justice, could not be ignorant of the most received and known rules of evidence; and we may add that no one is more entitled to respect from all friends to the Amendment of the Law than Mr. Henley, whose invaluable services to that cause, when he and Sir James Graham were the able and most useful lay members of the Chancery Commission under Sir John Romilly, must be held in grateful and lasting remembrance. It is, therefore, under a conviction that he regarded the investigation over which he presided in the light just described, that we proceed to note the course of the proceedings, with any view rather than that of censuring it, but certainly with the design of suggesting to the wisdom of Parliament, the necessity of making one very material change in its modes of procedure.

We shall first give a sample of the evidence; and we may take it almost at random; but we prefer selecting a part by no means the most remarkable for sinning against all rules, supposing this was a judicial and not what we have termed a police inquiry.

Dr. J. Gray, proprietor and editor of an Irish newspaper, had, both in his paper and in speeches, brought general charges of corruption against Irish Members, and when called as a witness, he could give nothing but vague rumour and hearsay as the ground of those charges. Among others, the following was shifted by him upon another newspaper editor, who is also a Member of Parliament, and who we perceive is about to receive a testimonial from his friends of the Roman Catholic Church, for his great services to their cause. Probably such services as are here recorded, may not be among that number. Dr. Gray's second examination was March 1. 1854.

“ Question. Can you mention the name of any Member

of either the past or the present Parliament whom you have *heard charged* with selling places, or obtaining a pecuniary advantage by disposing of them?"—*Answer*. "There are two Members of the present Parliament named by Mr. Lucas in the conversation *which I heard*.

"Q. Who were they?—A. Mr. Roche and young Mr. O'Connell."

Again, in answer to another question, he says, "Mr. Lucas stated to me that *he had heard of cases*; the parties who *mentioned* them he did not name, but the parties who were *alleged* to have had these transactions were Mr. Roche and Mr. O'Connell."

He afterwards says, when asked if he had heard any other Members of Parliament named, "I have *heard* it stated that there was a case before a Bankrupt Court, in which the name of a Member was *mentioned* in the proceedings there. I do not exactly recollect that case. The statement made to me was to the effect, that it came out before a Bankrupt or Insolvency Court, upon a man explaining the condition of his affairs, that he had been a long time expecting a situation through the influence of a Member, and that a bill due by that Member was to be wiped out on his getting the situation." Being asked to name the Member, he answers "Mr. Morgan John O'Connell." The one before named was another of the family.

Mr. Lucas is then called, and admits that he had given the two names to Dr. Gray, but asserts that he never intended they should be communicated to the Committee, but the contrary; and being asked, why, if so, he being a Member attending the Committee, and Dr. Grey a witness before it, he (Mr. Lucas) went out of the room and mentioned the names of two Members, and accused them of this offence? He answers, "Because it was in my mind, and I spoke indiscreetly." (p. 50). He repeatedly says it was an indiscretion; but when called on some days after to name the parties from whom he heard the story, he peremptorily refuses to name them, and adds, that on further reflection he does not consider the mention of the names of the accused Members was an indiscretion (p. 80). Being by the Committee told

that he had admitted the indiscretion by which a communication had been made affecting two Members of Parliament, and that he yet declined giving the names of the parties by means of whom the truth or falsehood of the statement may be ascertained, he not knowing whether these parties can or cannot substantiate the fact; he at once says, "*I have not the slightest reason to imagine that they can*" (p. 51).

It is fit, before proceeding further, to add, that no one for a moment believed in those charges having the shadow of foundation. Mr. Roche and the Messrs. O'Connell, in the judgment of all who heard the tissue of tales told,—evidence we cannot call it,—were not in even the slightest degree affected by it.

But now let us consider what is the tendency, what the inevitable effect, of such statements received in public, collected in an authentic shape, reported to the Commons House of Parliament, printed among its proceedings, sold with the rest of its papers, and accessible to the whole world through the newspapers, who are by law, at least by the late course of judicial procedure, entitled to publish it universally. We have no manner of doubt that Mr. Henley deemed it both expedient and just, to allow the fullest scope to the witnesses in their attempts at backing up with their depositions the random statements which they had made in newspaper paragraphs and hustings' speeches; and it is very probable that no other course could so effectually have silenced the clamour, or proved it to be groundless.—The inquiry, says the Report, (p. vi.) was "extended to a latitude which involved the reception of idle gossip, and the investigation of groundless calumnies."—It is also undeniable that the Committee, on the distinction which we have taken, and acting for general *quasi-police* inquiry, without being confined to the *quasi-judicial* office, was justified in letting in all such hearsay. But, then, we conceive that two propositions are of equally undeniable truth, first, that the *quasi-judicial* should be kept apart from the *quasi-police* investigation; and next, that while the former should be conducted with all publicity, the latter should be carried on privately, and its result only made public when

the disclosure cannot work injustice or hardship. The disgrace which so many of the witnesses brought upon themselves, the discredit which to a certain degree they brought upon the body they belong to, is no compensation to those persons whom their slanders assailed; and those slanders are universally circulated, and even among thoughtless readers pass current as sanctioned by a kind of public authority, because the House of Commons insists upon such inquiries being carried on with open doors, and the evidence as well as the result published in detail.

It cannot be doubted that the credit of the House itself in some small degree, the credit of one portion of its members in a great degree, has been lowered by this whole proceeding.

THE SESSION.

THE period of the Session which has elapsed since our last Number appeared presents not a few instances of disappointment to the friends of Law Amendment; but happily so much is of a cheering character that the balance rests in favour of the good cause, always assuming, as we have a right to do, the success of the measures, few in number, but of vast importance, which remain to be finally sanctioned by the Legislature.

We shall not go through the list of the Bills that have been withdrawn or postponed by the Government, some of them, we suspect, unnecessarily, but none of them so manifestly certain of passing as to involve their authors in a grave charge of rash abandonment. The circumstances of the country were peculiar; and the attention of all, both in Parliament and out of doors, was absorbed in the operations of the war. Hence the extreme reluctance of all parties to entertain any subject unconnected with the prevailing topic; but hence also the absolute necessity of sacrificing every other consideration to the paramount duty of urging on the measures connected with financial and military affairs, and of suffering none other to stand for a day or an hour in the way of these. When it is known that nothing which delays

the passing bills of the first necessity can be suffered by the Government, and that the Parliament is entirely of the same mind, the fate of any other bill, if opposed, is sealed; because it requires but a dozen or two of determined adversaries to create the dreaded delay, and even individual authors of the measure must give way, but the Government certainly will be under the necessity of yielding. As long as the urgency exists, and there are some bills which must at all hazards be passed, with respect to every other, how important soever in itself, by how great a majority soever favoured, the most insignificant minority is all powerful, and the useful and favourite measure is doomed. To all the other impediments in the way of the Government is to be added the incessant obstructions offered by the selfishness, the crotchets, the vanity, the more sordid propensities of individuals — of some men who only seek to distinguish themselves, of others who resent their friends having left them out in the arrangements of office, of not a few who, having place, would rise higher, of all the class which *plora-vere suis non respondere favorem speratam meritis*. To the efforts of private legislation this obstruction is quite fatal; it is with the utmost difficulty overcome by the Government. It is with a full and free admission of this fair excuse for the course pursued, both by the Government and by individuals, in giving up important bills, that we proceed to note, and to comment upon, some passages in the latter part of the Session.

The subject of Codification seems to claim our regard in the first instance, so far at least as the Criminal Law Digest is concerned. The unfortunate step taken by the Lord Chancellor of consulting the Judges upon a matter which the House of Lords had repeatedly determined — the general question of Code or no Code — is fresh in the recollection of our readers, as is the result of that error, the answer given by those learned persons to the case laid before them. Never to be sure was there exhibited in such striking colours the contrast between men's competency within the limits of their own province, and their incapacity beyond those bounds, — between Judges exercising judicial functions and Judges

turned lawgivers, — as on this ever memorable occasion. But in truth they made that contrast far more glaring than they needed to have done. They did not give themselves fair play. They took no heed to the work which they somewhat eagerly and very hastily set about. A work of considerable bulk and of no little difficulty was referred to them for their opinion, and—the most obvious course being to read it with the attention and the care required by its importance, and only to pronounce upon its merits after such a perusal,—they condemned it unread; and—forgetting the sage counsel of Lord Mansfield against giving reasons (an advice not more applicable to those who have cast upon them the office of administering a law they are ignorant of, than to those who volunteer their decisions upon the merits of a law they have not taken the trouble to read,)—they gave in some detail the grounds of the opinion arrived at with so much more haste than good speed. The same able and learned and upright persons—who in their judicial capacity would on no account whatever have pronounced an opinion, or even the inclination of an opinion, upon the import of any instrument, be it a deed, or a bill, or an agreement, without carefully examining every word and letter of it; or who in searching for the meaning of a statute, in order to apply it in a case before them, would have compared each of its provisions with all the rest, and each word of each provision with the whole context; or who in trying if the matter before them was within the scope of some precedent, would have carefully examined all decided cases,—passed without hesitation sentence of condemnation upon article after article of the draft submitted to them, when a reference to some other articles would at once have displaced the decision; and censured as innovation what had been determined by the Courts or enacted by the Legislature. A most acute, learned, elaborate, but temperate and even respectful reply was given to the objections of the Judges by Messrs. Greaves and Lonsdale, the draftsmen of whose assistance the Lords' Committee had availed themselves; and this able paper left but one opinion both in the Profession and out of it, that with hardly any exception the supposed

errors had no existence, the mistakes being those of the critics of the work, not of its authors.¹

Some adversaries of Codification in the Commons, unaware probably of the triumphant reply, moved for the production of the Judges' statements. The Lord Chancellor had objected to lay before Parliament the letter from Messrs. Greaves and Lonsdale, as it was addressed to him not by official persons; but on the same letter being thrown into the form of a memorandum, his Lordship, with that candour and fairness which is habitual to him, so well becoming his judicial station, and that courtesy which adorns his higher qualities, laid it before the Lords, so that it was forthwith in the possession of the other House and circulated with the rest of its papers. His lordship then referred to a Select Committee the Digest, already all but finished, that is the great branch of offences against the person already reported by the Select Committee of last year, and on which the Judges had commented, together with divers Bills which he had caused to be prepared, containing all the other branches of the Criminal Law²; and also the paper of Messrs. Greaves and Lonsdale. The Committee reported that it was expedient to begin with a complete Digest of the Statute Law, and intimated an opinion that without waiting for the Statutory Digest, it might be advisable to go on with the important branch of Criminal Law Procedure, of which the Commissioners had presented an elaborate and most valuable Digest, not comprised in either of Lord Brougham's Bills, because it

¹ The strong opinions expressed against the answers of the Judges, and their whole conduct of the inquiry as to the merits of the Digest, both by the Edinburgh and the Quarterly Review, merit attention. The two great organs of public opinion, that of the Church and King party and that of the Liberals, on this subject have no difference of opinion whatever. Indeed we must observe that at all times the Quarterly Review, even in the days of Lord Eldon, took ably and strenuously the part of Law Reform, in days when that cause had but little of its present popularity.

² Lord Brougham's Bills of 1846 and 1849, embodying the Report of the Criminal Law Commissioners, comprised the whole subject. But it was afterwards resolved to divide it into chapters, and pass it in successive Bills, finally to be reduced into one. Hence offences against the person was the head or branch first taken, and the seven others now followed prepared by the Lord Chancellor.

had not undergone the revision of other Commissioners, as the Digest of Crimes and Punishments had done, at the recommendation of Lord Lyndhurst. We believe that there is daily an advance making among all reflecting men towards the conclusion which we have more than once announced — that Parliament must in the end give its entire confidence to the labours of some draughtsmen, and some Committee of one or both Houses, and pass the result at once into a law. But of one thing we are quite certain; that were all codification to cease as far as Parliament is concerned, the great Digest already prepared will be in the hands of all lawyers, judges as well as practitioners, and will soon possess almost as great authority as if it had received legislative sanction. While it continues under discussion, this consummation must needs be delayed. Every one feels assured that to pass each article is all but impossible, if each is to undergo the ordinary process of Parliamentary enactment; and the whole being taken as a whole seems the only practical course, if we are to have, as all men or nearly all now think we ought to have, a Digest of the Law.²

We have made reference to the Judges in their legislative capacity. But of late they have shown, on several occasions, the most laudable spirit of Law Amendment; and Lord Brougham even announced them recently as coadjutors in the good work; we mean so far as regards the important office of pointing out defects in the law, which none better than those who administer it are fitted to perform. The Equity Judges, and especially Lord Justice Knight Bruce, has rendered important service repeatedly by pointing out abuses in professional practice and defects in the rules which regulate it. The Common Law Judges have often acted in the same sound and enlightened spirit. A late case in the Court of Exchequer affords an instance of this.—Sums of a considerable amount were found to have been almost wholly

² The Statute Law Digest, we may hope, will now be proceeded in with redoubled vigour and despatch. Our opinion has once and again been expressed on the great services rendered to this branch of the Legal Service, by Mr. Arthur Symonds, who has for a far longer time and with far more diligence than any other labourer in the same field, prepared the way of this work.

consumed in the costs of carrying a case backward and forward from the Consistorial Courts to the Court of Chancery, because the Judge who had to decide on the validity of the will had no power to deal with the rights of the parties under it, while the Equity Judges could not touch the question of probate. The Chief Baron expressed his hopes that the circumstances of the case being made known to the Government and the Parliament through the Press, would draw their attention to the necessity of affording a remedy to so great an evil. Mr. Baron Martin observed that they had been preaching about Law Reform for twenty years, and done nothing. Mr. Baron Alderson said that was because the change in question was a practical reform, and men preferred making flashy speeches to doing the work. We presume the learned Barons could hardly mean that nothing but making speeches had been done for the last twenty years, during which the greatest changes have been effected in every branch of our jurisprudence. But they were just as wrong in their assumption that nothing had been done to remove the particular imperfection of which they complained; and as wrong in that assumption as they were right in their complaint. The Lord Chancellor had introduced a Bill comprehending the remedy for that as well as many other evils in the existing system; it had, after much discussion, passed through the House of Lords, and was, at the time of the conversation in the Exchequer, landed in the Commons, there to be adopted or rejected. There it, unhappily, shared the fate of other excellent Bills, and was, for the reasons which we have already stated, of necessity postponed to more urgent measures. But we have deemed it proper to make mention of the recommendation proceeding from the learned Barons of Exchequer, notwithstanding the somewhat discourteous language in which it was couched, and notwithstanding the ignorance it betrayed of what had been recently done in Parliament, because we are quite certain that the advice tendered was taken in good part, and no kind of ill-feeling upon the subject shown in any quarter, because we hold it to be most important that Judges should freely state their opinions respecting defects in the law as often as the evil consequences thereof appear practically in the cases

which come before them, and because the public declaration of these opinions on the subject by those learned persons with unfettered freedom is calculated to benefit both the Legislature and the community. Lord Tenterden did good service to both when he delicately as well as classically said, on his court vainly attempting to construe an unconstruable Act of Parliament: "We cannot say that the Legislature is *inops consilii*; but we may say that it is *magnas inter opes inops*."

Of the two Bills touching Ecclesiastical Courts, the first transferred all questions of Probate to the Court of Chancery, it being understood that these should be confined to one branch of the Court; the second transferred to the same Court all questions of marriage and divorce, now competent to the Consistorial Courts, and vested in a new Court composed of the Chancellor, the Chief Justice, the Master of the Rolls, and two other Judges, the power of granting divorce *a vinculo*, now only exercised by Parliament. Had these important Bills been suffered to go through the House of Commons, it is probable that some material alterations might have been made of their provisions. There can be no doubt that very early next Session they will be introduced; and from the progress already made in their examination, they are likely to be very speedily passed. They are to be accompanied by another Bill, which the Lord Chancellor announced, for making considerable improvements in the Ecclesiastical Jurisdiction. The able Reports of the Ecclesiastical Commissioners of former years, and the more recent most learned and able Report of the Commission respecting the Law of Marriage and Divorce, at the head of which was the Lord Chief Justice, and which had the valuable and gratuitous services of Mr. Macqueen as Secretary, form the foundation of all these measures.

One very important measure has been successfully propounded by a distinguished practitioner in those Courts, Dr. Robert Phillimore, and it was carried through both Houses without opposition. The Act of 1840 gave the Court of Admiralty the power of proceeding by *viva voce* evidence, with or without depositions and affidavits. This provision was found to work perfectly well, and Dr. Phillimore's Bill

extends it to all Ecclesiastical Courts. Lord Brougham, who took charge of it in the Lords, strongly urged the expediency of applying the same rule to the Court of Chancery, which he regarded as wholly incapable of effectual improvement as long as one person saw and heard the witnesses, and another had to decide on their testimony. Lord Lyndhurst had often made the same objection; and Lord Campbell entirely supported Lord Brougham's proposal, with the great weight of his experience both at the Bar and on the Bench. It is admitted on all hands that an improvement has been made in the Chancery practice by introducing examinations before a Commissioner in the place of depositions before an examiner upon written interrogatories, and by giving the examiner power to put questions instead of confining him to reading the interrogatories, — that is to say, instead of the very worst possible procedure, there has been introduced the next worst. A witness is no longer asked a second question framed in ignorance of what answer he had given to the first, and cross-examination and re-examination are no longer absolutely excluded. But still he is examined by one man, and another weighs his evidence, and decides upon it, there being, as was observed in the discussion, that preposterous division of labour which did not tend to make the workmanship better, but to make the work more bulky, certainly, and yet nearly worthless.

A sample of the procedure was given by Lord Brougham from the information of a friend now acting as Commissioner for taking the examination of witnesses. Already 400*l.* expense had been incurred, and the depositions extended over 400 folios, but before the proceeding was closed, the learned Commissioner thought it was likely 1500 folios might not contain them; and then, with all these depositions, he of course had nothing to do but seal them up and send them hundreds of miles off to be considered by the Judge, who had never seen one of the witnesses. The Lord Chancellor admitted all that had been said against the present practice, but observed that it had been found a considerable improvement upon the old one. He, however, knew that the whole subject was under the con-

sideration of the Chancery Commission, and though he was aware of the great difficulties which existed in assimilating the Equity to the Common Law procedure as regards taking of evidence,—he hoped they would not be found insurmountable. He mentioned the difference of Equity and Common Law procedure, there being no definite issue or set of issues, and the necessity arising of protracting the inquiry, so as to detain witnesses in town. To which it was answered, that the parties might be called upon to state the facts alleged and denied, on both sides; that the questions before the Court of Admiralty, as salvage, closely resembled the issues in Equity by the number of circumstances, to all of which the Judge's attention must be directed; that no difficulty had been found in dealing with such cases, by examining the witnesses in presence of the Court, which had the further advantage of an exact statement of all the depositions in writing, taken by a sworn officer; and that the Court of Chancery might, by giving the parties notice that all their evidence must be adduced on one day, or on consecutive days, prevent the necessity of detaining witnesses more than they may be kept on trials at *Nis Prius*. The Lord Chancellor further remarked upon the evil of bringing up witnesses to town in all cases, the Courts of Equity going no circuits like those of Common Law. To this the answer was obvious; let matters of fact be tried before the Local Courts, and a special verdict returned by them, either with or without the assistance of Juries, as parties might agree; and then let the Courts of Equity proceed with the cause on the foot of the facts as so found; unless, indeed, a new trial might be asked; and that could only be given upon the notes of the evidence, if the objection taken was not to the Judge's ruling in point of law. But then the Courts of Equity would only be under the same difficulty with those of Common Law, which decide on motions for a new trial upon the notes of the Judge, and the statements of the counsel. Upon the whole, we believe that the prevailing opinion was in favour of the change proposed; that its supporters were thought to have made out a strong case in its behalf; and that at no very distant period the

greatest of all the amendments which have ever been propounded, will be happily introduced into the Court of Chancery. In truth, it is *fusion* in its most important branch, and the successful experience of the Court of Admiralty seems to prove it as easy and as safe as it is eminently advantageous. This step, once made, hardly any other will remain to be taken towards fusion, at least after the equitable powers conferred upon the Common Law Courts by the Procedure Bill, and the powers of assessing damages given to Courts of Equity by the Bill of Sir R. Bethell.

The Common Law Procedure Bill is no doubt the great measure of the Session as regards Law Amendment; and as its passing through the Commons may be considered certain, after the full consideration which it received in the Select Committee of the Lords, we may congratulate all friends of Legal Reform upon this most valuable improvement in our Jurisprudence. The Second Report of the Common Law Commissioners has received general and unqualified praise for its large and enlightened views; and among other less important changes which it recommended, there are two of themselves sufficient to stamp this remarkable document with the character of combined boldness and wisdom. We refer to the vesting in Common Law Courts a large portion of equitable jurisdiction; and the enabling the Judge in all cases to dispense with the necessity of an oath, when satisfied that the witness declines to swear from conscientious scruples. But there having been also referred to the same select committee of the Lords, Lord Brougham's Bill on Evidence and Procedure and his Arbitration Bill, the most important provisions of both bills were incorporated with the Procedure Bill; and beside effecting considerable amendments on the Law of Evidence, the great step has been made of allowing parties to dispense with juries in the great bulk of actions, under the sanction of the Court, and of making submission to arbitration compulsory in certain cases as well as rendering all agreements, or covenants of reference effectual both in Law and Equity. Nothing has been done to remove the greatest blot that remains upon our Law of Evidence, the allowing a witness to protect himself and injure the parties,

nay, to defeat the course of justice, criminal and civil, by the statement or the pretence that his answer might criminate himself. But we do not conceive that this remnant of the more barbarous state of the Law, can be suffered long to survive the great reformation which has of late been happily effected.

Some of the most important of these changes we owe to the experience of the County Courts; as the great improvement of the examination of parties, the value of which each succeeding day more clearly proves, and the giving parties the choice of having their cause tried by judge or jury, a natural, almost an unavoidable, consequence of finding that in not above three per cent. of the causes tried in the County Courts, where the parties had the option, recourse to a jury was desired by either party. We are thus naturally enough led to consider what has been effected for the improvement of the County Court jurisdiction and procedure; and sorry we are to say, that no report has as yet been presented by the Commissioners to whom this important matter was referred twelve months ago. The rules touching costs, which hampered the proceedings of these Courts, the inaction of the authorities who have the power of settling such questions, and remedying the mischief caused by ill-considered regulations; above all, the heavy burthen of taxation under which they labour, have as yet received no effectual consideration. The County Court taxes have repeatedly, during the Session, been brought before the House of Lords; and Lord Brougham, on each successive occasion, found an universal assent to his often-urged complaints. No one was hardy enough to deny that the grievance is intolerable of levying 270,000*l.* a-year of taxes on the County Court suitor, when on the suitor in the Superior Courts 50,000*l.*, and no more, is the sum exacted; no one was found of courage, or of thoughtlessness, sufficient to pretend that the State should pay the Judges of all other Courts, but that the suitor in the County Courts should pay the salaries of his Judges. The answer to this remonstrance was, "What you say is quite true; nothing can be more grievous than this injustice; but wait until all other matters are to be arranged regarding the expenses of the judicial establishment,

and then this will be considered among the rest." The reply is most triumphant; that this grievance stands wholly apart and insulated from all the other branches of the subject, and must needs be met and removed, whatever may become of all the other parts in the system, and at whatever time they may be examined. The postponement — and upon such grounds, such pretexts — is as if a man should delay getting rid of a debt for which he was paying heavy annuity interest, until he could examine his whole burthens and resources; or should delay the relief of drawing a bad tooth until he had an opportunity of stopping, and plugging, and scaling all the other teeth in his head.

The important Bill for entirely abolishing the Usury Laws has been introduced by Lord Lansdowne, and with universal assent. This great measure has not been delayed until all the Law of Debtor and Creditor, nay, all the Mercantile Law, had been revised and placed upon a sound and rational footing; although the same reasons which were urged for postponing the consideration of taxes on County Courts would have applied to the repeal of the Usury Law. It was remarked, on Lord Lansdowne's very just reference to Mr. Bentham's Defence of Usury, as having for ever set the question at rest by triumphant demonstration, that in the same tract was also to be found the same author's protest against Law taxes, a demonstration if possible more close, more rigorous, more triumphant than the other, to which position his Lordship at once assented. It is very possible that the repeal of those usury laws may lead to another legal change now a great favourite with the House of Commons, the permission of limited liability in partnership. Certain it is, that if any amount of interest is allowed to be taken on loans, there might be permission given to take interest of any kind, that is, estimated in any way; and if it may be proportioned to the profits of the trader who borrows the money, without constituting the lender a partner, we have here limited liability at once without partnership. It seems more than doubtful, if the law, as it now stands, would not exempt such a lender from partnership. The cases of wages paid in proportion to profits, of authors

paid for their copyright by a share of profits, nay, of the share of certain adventures, as grazing of cattle, being paid for in proportion to the gains made by their sale, make it very questionable if the case we have put is not already one of loan without partnership.¹ A single declaratory enactment, if introduced into the Bill, would at once settle the question as regards loans, and give the whole benefits of limited liability.

Among the postponed Bills are, unfortunately, those which relate to Bankruptcy and Insolvency. The Commissioners upon Assimilation of the Mercantile Law, reported that while the Scotch Bankruptcy Bill was actually before Parliament, and had indeed been read a second time, they could not enter upon that, the most important branch of their inquiry. Against that Bill some Scotch petitions were presented; but it appeared clearly that the great body of the mercantile men of Glasgow, Aberdeen, Dundee, indeed Edinburgh excepted, of all Scotland, were strongly in favour of the measure, while the whole of the trading community in England was decidedly and anxiously desirous of it. The Lord Chancellor, however, suggested that as the Bill would naturally be referred to a Select Committee, and as the Commissioners had, for the reason assigned, not yet considered it, there would be a great convenience in postponing it for the present. To this Lord Brougham assented, the rather because a Bill upon the same principles for Ireland had been brought into the Commons, and one founded on the Report of the Bankruptcy Commission for England must be soon introduced, and thus it seemed expedient that the measures for the three kingdoms should proceed together. Indeed the assimilation so much desired by all could hardly otherwise be effected. A memorial on this subject was immediately presented to the Lord Chancellor, who held a conference with a Deputation from the great body of the London bankers, merchants, and trades.

¹ *Ex parte Hamp*, 17 Ves. 406; *Benjamin v. Portman*, 2 H. B. 590.; *Wish v. Small*, 1 Campb. 331.; *Gibbon v. Wilcox*, 2 No. 45.; *Muirhead v. Salter*, 4 B. A. 167.

I was signed by 251 of the first city firms, comprehending above a thousand persons, the great mercantile men of London, and all more or less directly interested in the trade carried on in Scotland and Ireland, as well as in England. They entreated the Government to seize the occasion now so opportunely offered by the progress of three several measures applicable to the Bankruptcy Law of the three kingdoms, and to issue a commission for full inquiry into the best means of assimilating that law throughout the realm. We can hardly doubt that so reasonable a request will be granted, and that there will result from the investigation the inestimable benefit to the whole trade of the country, of a uniform Law upon Bankruptcy and Insolvency.

A portion of our Scotch fellow subjects have expressed some alarm at the idea of the English Mercantile Law being extended to Scotland. But assimilation may well be expected to produce the great benefit to both countries, of giving to each the parts of the legal system which experience has, in the other, proved to have unquestionable advantages. A remarkable example of this has been afforded by the Bills of Exchange Bill, which was introduced into the House of Lords by Lord Brougham, before Easter, and being approved with some variations, by the Select Committee on Common Law Procedure, was afterwards passed, and has now nearly gone through all its stages in the Commons. For this great improvement in our Law we are altogether indebted to Scotland. The summary diligence on bills and notes has for above a century and a half been the law of Scotland, and it has been productive of the greatest benefits. In England the party who has drawn or accepted a bill, can have recourse to every means of deferring payment which the course of litigation affords, and though he has not the shadow of a defence, he delays his creditor, the holder of the bill, for months, insolvency or bankruptcy often happening in the meanwhile. The Lord Chief Justice, who warmly supported the introduction of the Scotch procedure, expressed at the late Sittings at Guildhall, his hope that the Bill would soon pass, and prevent the recurrence of what had that morning occurred, sixteen causes on bills of exchange

and promissory notes, every one of which proved, when opened, to be undefended, and in all of which the holder had been kept out of his just rights, and the funds for distribution among other creditors been diminished by the costs of litigation. A petition in favour of the Bill was soon after presented by Lord John Russell to the Commons, from 309 of the leading houses of bankers, merchants, and traders in the city, and meetings held in all the great trading towns have passed resolutions calling for this valuable improvement of the Law. In fact, there are no persons adverse to it, except certain attornies who dread a loss of business, and certain inferior tradesmen and railway speculators, who dislike the unpleasant operation of being compelled to pay their debts at the time when these are due.

If this Bill, and that on Common Law Procedure, shall pass, it is impossible to deny that the Session will have been most fruitful in important amendments of the Law, independent of the other lesser measures to which we have referred, and to which, we may add one hardly to be classed among those of inferior magnitude. Lord Harrowby's Bill, already passed for the Registry of Bills of Sale, supplies a defect long complained of; and the extension of its provisions, by the Commons, to Insolvency, the Lords having confined it to Bankruptcy, is an undoubted improvement.

It is much to be lamented that on Criminal Jurisprudence, Mr. Aglionby's Bill to enable prisoners arrested for larceny to plead guilty before Petty Sessions, and thus save the delay and expense of sending them to Quarter Sessions or Assizes, was postponed; and that Mr. Phillimore's Bill for a Public Prosecutor did not reach such a stage as to make the pledge given by the Government more specific and effectual, that they would undertake the subject. No one could blame Mr. Aglionby for yielding to the pressure, near the close of the Session, with the intention of adopting next year the suggestions of the Lord Chief Justice for extending the scope of the Bill; and Mr. Phillimore deserves great commendation for the fairness and candour of the spirit in which he acceded to the suggestion of the Government, that the great difficulties in the way of a general measure for a

Public Prosecutor, or his delegates, all over the country, might possibly be overcome, were the plan tried partially in the first instance. He did good service by bringing forward the plan; and it is impossible to deny that his consenting to its postponement only evinced his sincere desire for its success.

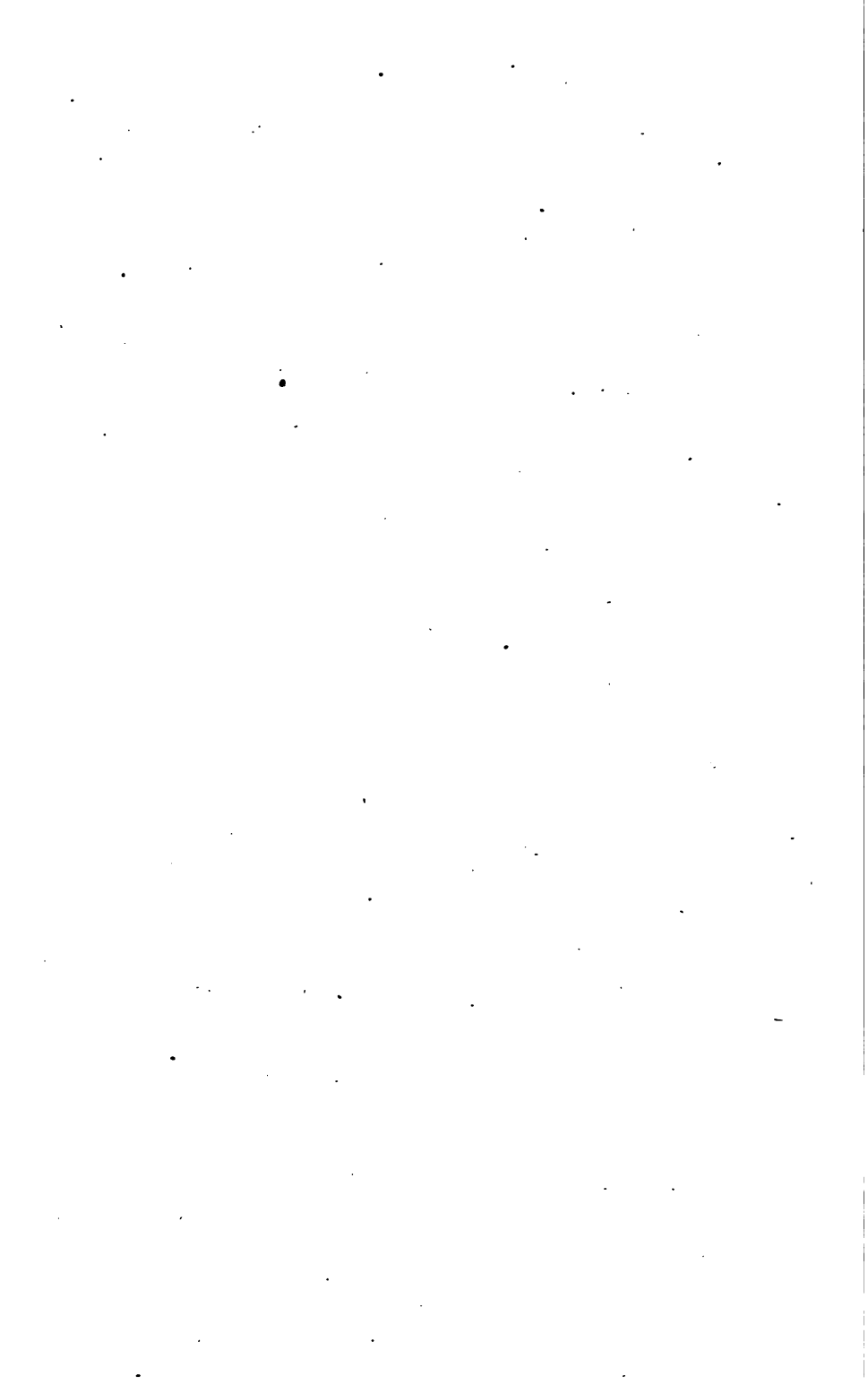
We here close our review of the events in the latter portion of the Session. Our hope is (not unmingled with apprehension when we regard the endless contentions prevailing in Parliament on party and personal questions, and the manner in which public business has been too often conducted) that no more defeats may await the friends of Law Amendment, and that the end of the Parliamentary year will be marked by the adoption, and not by the rejection, of the important measures which are now so near being carried.

NOTE.

WE have expressed no more than a confidence in Lord Cranworth as a Law Reformer, in the course of this article; of his eminent merits as a judge, both for acuteness, learning, unwearied industry, and unceasing patience, it is wholly superfluous to speak.

We have adverted also with equal justice to another eminent individual, Lord Lyndhurst, whose services to the great cause of Law Amendment have been unvaried and invaluable, and happily are still continued.

We have said nothing of the Bribery Bill in our Summary, because it is daily undergoing alterations. But we must bear our testimony to the great merits of Mr. Walpole, as Chairman of the Select Committee, and as having had a principal share in the Bill as reported from that Committee. But indeed his whole conduct, both while in office and since, has been that of a firm but judicious friend to the Amendment of the Law. Sir F. Kelly deserves this praise also, and his Bribery Bill gave the important provision of the Elective officer, which the Committee adopted.



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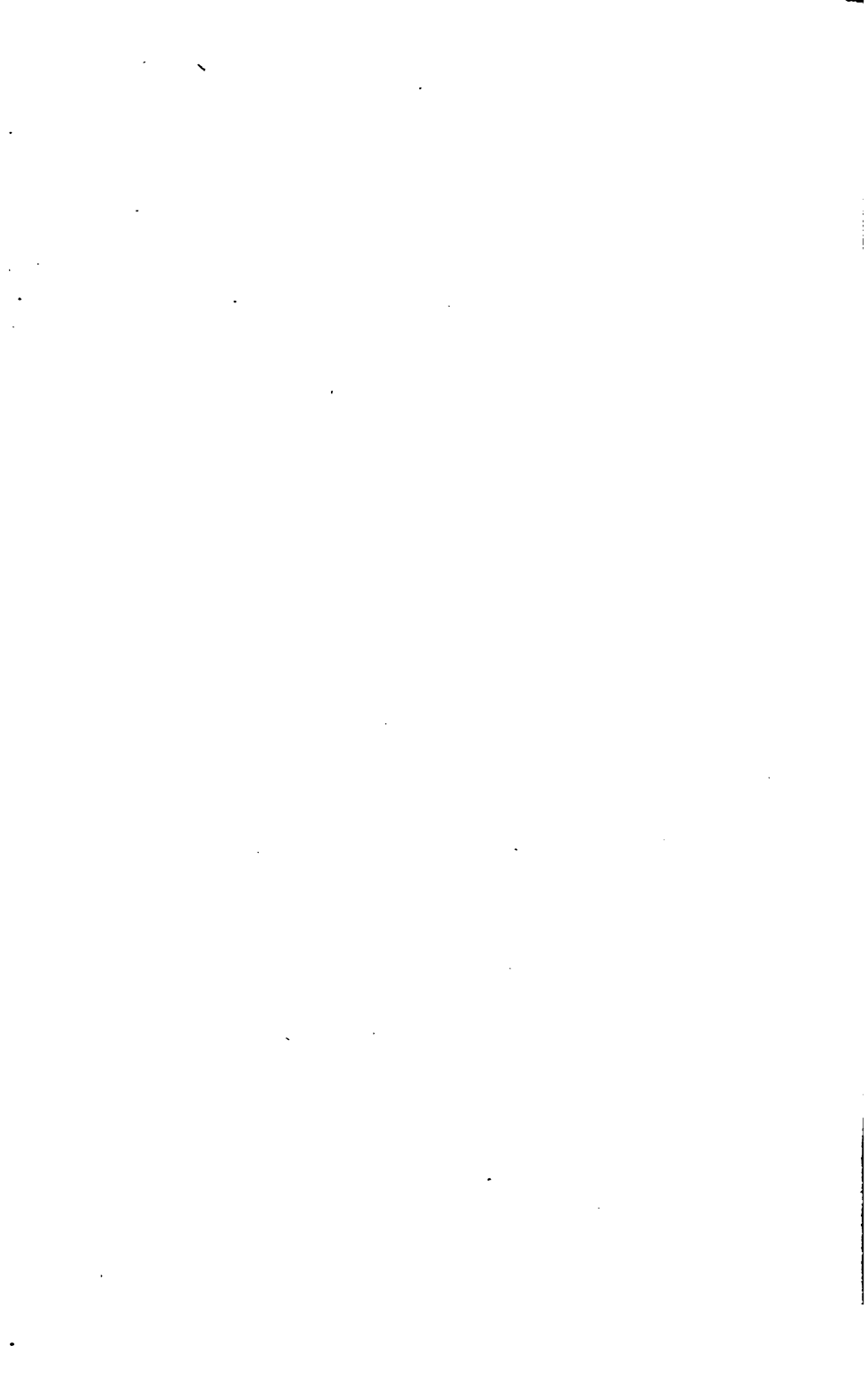
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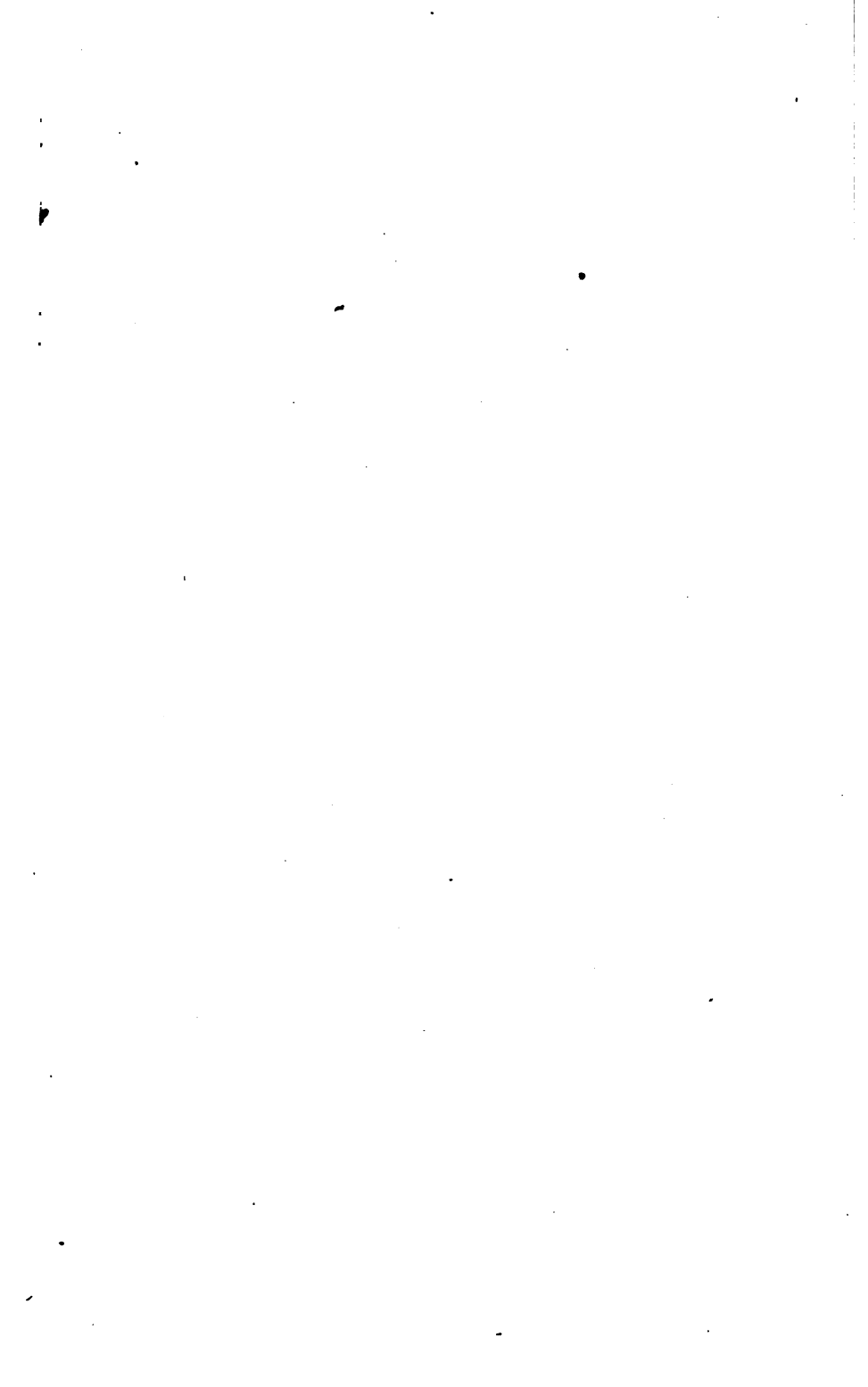
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